No. 504.

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Brf. of Swink for Appellee.

SUPREME COURT OF THE UNITED STATES.

Filed April 11, 1901.

NO. 504 OCTOBER TERM, 1900.

JOHN D. WALL and THOMAS W. HUSKE, trading as WALL & HUSKE, APPELLANTS,

vs.

WALTER. O. COX, Trustee of W. H. GILBERT, Trading as WINSTON HARDWARE COMPANY and as GILBERT HARDWARE COMPANY, APPELLEE.

On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

ARGUMENT FOR APPELLEE.

LOUIS M. SWINK,
LINDSAY PATTERSON,
Counsel for Appellee.

Supreme Court of the United States.

NO. 504, OCTOBER TERM, 1900.

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vs.

WALTER O. COX, Trustee of W. H. GILBERT, Trading as WINSTON HARDWARE CO, And as GILBERT HARDWARE COMPANY, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Statement of the Case on Behalf of Appellee.

The appellee, Walter O. Cox, trustee, does not agree with the statement of facts of the case as appears in the brief of the appellants, and respectfully submits the following:

> "W. H. Gilbert was a retail hardware dealer in the city of Winston, N. C., carrying a stock of $16,000.00 or $18,000.00. Becoming embarrassed in June 1899, he secured an extension from his creditors, executing notes in large amounts maturing December 1899 and January 1900. Immediately after securing this extension, he

bought largely of hardware dealers, increasing his stock to an abnormal extent, at the same time selling stock in hand at cut prices, at and below cost.

In September 1899, Gilbert repeatedly attempted to dispose of his stock, both at Martinsville, Va. and Winston, N. C., offering same considerably below alleged cost."

(The above is statement of facts by Judge EWART, found in 99 Fed. Rep. 546.

On the night of October 10th 1899, he agreed to sell his entire stock in the city of Winston, N. C. to Wall & Huske and on the next morning he executed a deed or bill of sale for same. The value of this stock was $16,000.00 to $18,000.00 and the consideration expressed in the bill of sale was $8,000.00, but it is alleged that not more than half that amount was actually paid by the appellants.

Immediately after receiving whatever moneys paid to him, on October 11th 1899, Gilbert left the state of North Carolina, without paying his creditors anything. His total indebtedness, at the time this bill of sale was executed, was about $19,000.00.

After Gilbert left on October 11th 1899, the appellants Wall & Huske, attempted to take charge of the stock of goods alleged to have been purchased by them. On the morning of October 12th 1899, certain creditors, filed in the District Court of the United Stated for the Western District of North Carolina, an involuntary petition in Bankruptcy, praying that the said W. H. Gilbert might be adjudged a bankrupt. The act of Bankruptcy, alleged to have been committed by Gilbert, was this fraudulent sale or transfer to the appellants, Wall & Huske.

On presenting this petition in bankruptcy, the creditors presented another petition before the District Court setting up the fact of the alleged fraudulent sale and charging the appellants with aiding and abetting the said Gilbert to defraud his creditors.

Upon this petition, His Honor Judge EWART issued a restraining order, restraining the appellants from disposing of or in any manner interfering with the stock of goods described in the bill of sale and also gave them notice to show cause upon a day therein named why they should not be perpetually enjoined.

On November 6th 1899, a Receiver was appointed in the Bankruptcy Proceedings by Judge EWART and an injunction was issued against the said Wall & Huske enjoining them from interfering with the property until the election and qualification of the trustee of W. H. Gilbert, and the trustee was ordered to bring suit in the United States Court or the Courts of the State to determine the matters in controversy.

The order appointing the Receiver does not appear in the record but the fact that a Receiver was appointed and took possession of the property appears fully from the findings of fact by Judge WADDILL, in rendering the opinion of the Circuit Court of Appeals in this cause as will appear by an inspection of same at page 410, Vol. 101 Fed. Reporter; and as appears as a fact found in the second question.

On October 27th 1899, the court duly adjudged W. H. Gilbert a bankrupt and on the 23rd day of November, Walter O. Cox, the appellee, was elected and qualified as trustee of the estate.

Subsequent to the qualification of Cox, trustee, the injunction of November 6th was continued by consent of counsel.

On the 6th day of December, 1899, Cox, trustee duly

filed his bill in equity and sued out a writ of subpoena in the district court.

On the 12th day of December 1899, Cox, trustee, filed his supplemental bill of complaint, alleging among other things, the sale, the institution of the suit in equity, attached a copy of the original bill to this supplemental bill, alleged that the stock of goods were deteriorating in value by reason of the orders of the court theretofore issued, that no inventory of the goods had ever been taken, the insolvency of Wall & Huske, and that the stock of goods had been purchased wholly on credit, that they were threatening to sell, dispose of or intermingle the stock of goods alleged to have been purchased with their own stock of goods, if they were allowed to have possession of the property, and the prayer of this supplemental bill was for the appointment of a Receiver to sell the goods and reduce same to money, and for an injunction until the matters in controversy could be heard. All of which appears fully by the copy of the supplemental bill on pages 11 and 12 of the record.

Upon the filing of this supplemental bill before His Honor Judge EWART, an order to show cause was duly issued returnable before the Judge on December 18th 1899, at Charlotte, N. C. This was continued, by consent, from day to day, and was heard before Judge EWART on January 9th 1900.

On January 6th 1900, the appellants, Wall & Huske, filed an answer to the supplemental bill in the proceedings, and also filed a pleading which they called a plea and demurrer, all of which appears on pages 13 and 14 of the certificate. They also, at the same, time filed affidavits in support of their answer, and plea and demurrer socalled, as appears by the record on page 16.

In these pleadings, they admitted the filing of the bill

in the district court by the complainant, admitted that the process had been duly served upon them, admitted that the stock of hardware was of value appeared in their answer to the original bill, that the property was deteriorating in value by reason of being locked up under the orders of the court, MADE AT THE INSTANCE OF THE CREDITORS.

They denied that no inventory had been taken of the stock of hardware,—that they had intermingled the stock of hardware with their own stock, except as appears by their answer and exhibits thereto attached, marked exhibits 1 and 2 and 3. They admitted that they were men of small means but averred that they were able to pay any damages which might be awarded against them; denied that they had pretended to purchase the stock from W. H. Gilbert, but averred that same was bought by them in good faith and that they had paid for it and denied that the trustee would suffer any loss or damage by allowing them to have possession of the property.

In their demurrer to the jurisdiction, they set up the following as appears by the record page 14:

> "Defendants, appearing specially under protest for the purpose of this plea, and for no other, say:
>
> "That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear and adequate remedy at law to recover same from these defendants and is not entitled to invoke the aid of the equitable jurisdiction of this court to enforce the right; and this honorable court, sitting as a court of equity, has no jurisdiction to hear and determine the question as a court of equity.

"Defendants further say that the district court of the United States for the Western District of North Carolina has no jurisdiction to entertain this bill of complaint or to determine the question arising between the complainant as trustee in bankruptcy of W. H. Gilbert and these defendants.

"That these defendants hold and claim title to the said property described in complainants bill under a purchase from W. H. Gilbert prior to the institution of the proceedings in bankruptcy against W. H. Gilbert.

"That both W. H. Gilbert, the complainant trustee, and these defendants were, at the time of filing said bill of complaint, and now are citizens of the State of North Carolina and that the defendants do not consent to the jurisdiction of this court.

"Wherefore, these defendants pray for judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein or to this motion for the appointment of a receiver and for the appointment of a receiver or for an injunction or for any of the matters and things therein contained, and pray that the motion of complainant for the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

"And further defendants pray that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained."

Here follows in the record the usual verification to a pleading as prescribed by the Code of North Carolina.

See Record pages 13, 14 and 15.

This cause was heard before his Honor Judge EWART on January 9th 1900, upon the pleadings as appear in the record, and also, upon affidavits of both sides in support of and against motion for Receiver.

See Record page 16.

On January 13th 1900, His Honor Judge EWART appointed a Receiver in the Equity suit, as appears by the order in the record on page 16.

This order is, in part, as follows:—

> "In the above entitled cause the plea to the jurisdiction to the court filed by the respondents is overruled. ON READING AND CONSIDERATION OF THE BILL THE PLAINTIFF AND ANSWER OF RESPONDENTS IS ORDERED, ETC."

On the 15th day of January 1900, His Honor filed an opinion in support of the order of the 13th. This opinion is found in Federal Reporter Vol. 99, at page 546 and is printed in full in the appendix of this brief.

Upon the rendering of this opinion, the appellants, Wall & Huske, filed a petition for Review in the Circuit Court of Appeals for the fourth Circuit and the cause was there heard, as upon appeal, in February 1900, before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge, and the opinion of the Court was delivered by his Honor Judge WADDILL on May 1st 1900, duly reported in Federal Reporter, Vol. 101, at page 403 and printed in full as an appendix to this brief.

A motion to rehear was filed before the Circuit Court of Appeals and the cause was heard at November Term 1900 of said Circuit Court of Appeals. The court then sends its certificate to this Court asking on the Record

its directions, and submits two questions:—

First:— Under the facts and pleadings above stated, had the District Court of the United States for the Western District of North Carolina, jurisdiction over the controversy?

Second:— Said District Courts having adjudicated bankruptcy on account of an alleged fraudulent transfer of the bankrupt's property, and having appointed a Receiver to hold the estate thus conveyed, had it, in said proceedings or in ancillary proceedings instituted either by the original petitioners, the receiver of the court, the bankrupt's trustee, or of the court's own motion, jurisdiction to bring in the alleged fraudulent transferree of the property, thus in the court's possession and do full and complete justice in one litigation?

ARGUMENT FOR APPELLEE.

The record states on page 17 that:—

> "The defendants Wall & Huske, desiring a review of the order overruling their demurrer, duly filed in the United States circuit court of appeals on the 22nd day of January, 1900, a petition asking the supervisory power of the court under the act of Congress of 1898, known as the bankrupt act."

The certificate also shows that the order made in the suit of Cox vs. Wall & Huske, was the appointment of a receiver to reduce the property to money and hold same during the pendency of the suit and until the end of the litigation.

While this interlocutory order, made in the conduct

of the suit at bar, is not strictly such an order as the Circuit Court of Appeals can take jurisdiction over, under Sec. 7 of the Act of March 3, 1891, (26 Stat. at L. 826) as amended February 18th, 1895 (28 Stat. at L. 666, Chap. 96) upon appeal, as this court has recently held in the case of Highland Avenue & Belt R. Co. vs. Columbian Equipment Co. 168 U. S. 627, we presume since the court is not required to pass upon the jurisdiction of the Circuit Court of Appeals in the question certified, that this court will consider the questions so certified and answer same. However under the authority of the above decision we do not think that the cause is properly in the Circuit Court of Appeals and we do not think the case of McLish vs. Roff 141 U. S. 662 is in any way in conflict with the case of Highland Avenue & Belt R. Co. vs. Columbia Equipment Co. supra.

First Question.

UNDER THE FACTS AND THE PLEADINGS ABOVE STATED, HAD THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA JURISDICTION OVER THE CONTROVERSY?

I.

Counsel for appellants says, "The record of the cause in this court clearly shows that the first question is," the identical question decided by this court in Bardes vs. Bank 178 U. S. 524. We think the questions sent up in this cause are a part of the record and a most essential part thereof. The counsel for appellants ASSUMES that this court will believe that the learned judges composing the Circuit Court of Appeals was not familiar with the opinion in Bardes vs. Bank, supra. It is not to be PRESUPPOSED that these learned judges, would in so short a time, after the opinion of this court was

handed down refer to it, the identical question just passed upon. When the certificate was being made up for this court, at the November Term of the Circuit Court of Appeals, counsel for appellants insisted strenuously that the question which appears in his argument, be the question certified. It seems certain that there was to his mind, at that time, a broad distinction between that question and the one certified.

The distinction appears fully by reference to the two cases. The decision of Bardes vs. Bank, supra, is of a general character, without reference to any particular facts, showing consent of the defendant or raising the equity jurisdiction of the court in possession of the RES. The question submitted in this record, raises fully the question of consent and also the equity jurisdiction of the court to entertain ancillary proceedings for the administration of an estate in the rightful possession of the bankrupt court. It also brings up the question, as to whether or not the appellants can object to the jurisdiction of the court by a demurrer, when the want of jurisdiction does not appear on the face of the bill, or whether they should take their objection in the usual method by motion to dismiss, plea in abatement, etc.

In North Carolina, the use of demurrers is expressly limited by Code Sec. 239.* All demurrers in North Carolina are special demurrers, as contradistinguished from a demurrer at law.

Love vs. Commissioners 64 N. C. 706.

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*Code Sec. 239.

"The defendant may demur to the complaint when it shall appear upon the face thereof, either:

(1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; or

(2) That the plaintiff has no legal capacity to sue; or

(3) That there is another action pending between the same parties for the same cause; or

(4) That there is a defect of parties plaintiff or defendant; or

(5) That several causes of action have been improperly united; or

(6) That the complaint does not state facts sufficient to constitute a cause of action.

The Statue above noted, Sec. 230, provides that the demurrer shall only be taken FOR MATTERS APPEARING UPON THE FACE OF THE COMPLAINT. This has been the uniform practice in North Carolina and has the support of all of the decisions of the court.

The fact that the court does not have jurisdiction of the person, and this fact not appearing on the face of the complaint, it must be taken advantage of by a plea in abatement, otherwise the jurisdictional question is waived, and the court can render a valid judgment.

McLean vs. McDougal 54 N. C. 8 Jo. Law 483, 484.
Killan vs. Fulbright 25 N. C. 3 Ire. Law, 9, 10.
Branch vs. Houston (Bush. L.) 44 N. C. 85.
Bank vs. Brittan 66 N. C. 365.
McMinn vs. Hamilton 77 N. C. 300.
Cloman vs. Staton 78 N. C. 255.

RODMAN J. rendering the opinion of the court in Bank vs. Brittan 66 N. C. 365, supra, use sthis language, "A demurrer for want of jurisdiction can only be sustained, where the want of jurisdiction appears upon the face of the complaint."

The general rule on the subject is stated in Vol. I. Ency. of Pleading and Practice, at pages 3 and 4 and is, in part as follows:

> "The objection in abatement that a court has no jurisdiction must be taken by a plea in abatement, unless the lack of jurisdiction appears upon the face of the record, when it may be taken by demurrer.
>
> "These pleas while admitting jurisdiction in some court, deny it to the particular court in which the suit is brought for some reason alleged."

Irrespective of the State statue, it is the practice in the courts of the United States to take advantage of lack

of jurisdiction over the person by plea in abatement and not by demurrer.

Mr. Justice NELSON in Smith vs. Kernochern 7 How. 198, says: "Objection, when taken to the jurisdiction on the ground of citizenship, it must be taken by plea in abatement," citing

D'Wolf vs. Rabaud 1 Peters 477.
Evans vs. Gee 11. ib., 80.
Sims vs. Hundley 6 How. 1.
Jones vs. League 18 How. 76.
Shepherd vs. Graves 14 How. 505.
DeSobry vs. Nicholson 70 U. S. 3 Wall. 423.
Mexican Cent. R. Co. v Pinkney 149 U. S. 194, 218.

This question is one of practice and procedure in which the State Statue governs.

U. S. Rev. Stat. Sec. 914. (17 Stat. at L. 197.)
Carter vs. Bennett 56 U. S. 15 How. 457.
Jones vs. McMasters. 61 U. S. 20 How. 22.

Nothing appears on the face of the bill in the cause at bar which would, in the remotest degree, suggest that the court did not have jurisdiction. The fact that appellants had certain personal exemptions, should have been brought to the attention of the court, not by a demurrer, but by a plea in statement.

There is no distinction in principle between the place where an action may be brought and the court in which it may be prosecuted, if the court has jurisdiction of the subject matter. The cases cited, supra, are exactly in point; the personal privilege conferred upon the defendant in Sect. 23 b is analogous to his exemption as to venue. Courts cannot be clothed with jurisdiction by consent, but must derive their jurisdiction over the subject matter of the suit, from the lawmaking power.

It is further stated in the brief for appellants that on record page 17:—

> "It is agreed that the cause was heard before his honor Judge EWART on demurrer of defendants to the jurisdiction of the United States District Court, and that the cause was heard before the United States Circuit Court of Appeals on demurrer to the jurisdiction of the United States District Court."

But counsel in quoting from the record omits an essential part of the same as the record continues, without so much as a comma.

> "Without objection from complainant as to the form of the plea, EXCEPT COMPLAINANT DID MAKE THIS OBJECTION ON THE ARGUMENT MADE ON THE REHEARING."

As we shall show presently, the substance of what is called by counsel for the appellants, the plea and demurrer, is that of an answer in fact and that same shows conclusively that the defendants consented to the jurisdiction of the court when they filed the same. It makes no difference to this court when objection to the form of the plea and demurrer was first made. It was duly made in the court below, with the consent of that court, as is clearly evidenced by their questions certified to this court. We also note in what is called the "Reply of Appellants" to this brief an argument to the effect that counsel not raising this point in the first hearing of the cause, the appellee had waived his right to object and that even if the appellants had made a general appearance to this action, the fact that appellee did not insist upon the general appearance on the first hearing before the Circuit Court of Appeals, appellants could not now be in court. I also notice no authority is cited for the proposition and presume none can be found. If by fil-

ing the pleadings which will be noticed now, appellants made a general appearance and came into court, no act of counsel can "waive" them out of court. The only remedy laid down in the books, is for the appellants to ask the court to be allowed to withdraw the objectionable pleading and not having done so, they are in court, whether the pleadings are called to the attention of the appellate court by counsel or the court of its own motion, takes cognizance of same. Appellee cannot waive them out of court. They must get out upon their own motion, if they are entitled to get out.

In this argument we have tried to confine ourselves to the record and we propose to argue the questions submitted to this court and the facts found therein and shall not travel out of the record and the questions and attempt to show a different state of evidential facts or to PRESUPPOSE or to SUBSTITUTE questions of our own findings which we may think arise in the record, for the questions submitted to this court by the Circuit Court of Appeals, as they are allowed to do under the law.

II.

We understand from the decisions of this court in the cases of Bardes vs. Bank, 178 U. S. 524; Mitchell vs. McClure 178 U. S. 539 and Hicks vs. Knost 178 U. S. 541, that Section 2 of the bankrupt act confers jurisdiction upon the District Court to entertain a suit on behalf of the trustee in bankruptcy to set aside a fraudulent transfer of property, or a preference or to recover a debt due the bankrupt's estate, except, that this jurisdiction is qualified by Sect. 23 b of the Act and by reason of that qualification, this jurisdiction can only be exercised, when the defendant consents to be sued in that court.

The first question then brings up for the considera-

tion of this court what consent is necessary, in order that the district court may entertain such a suit: whether the pleadings filed in this cause, evidence such a consent as is contemplated by Congress.

We do not understand the decision above mentioned to mean that the consent confers jurisdiction upon the district court. Consent of parties cannot give jurisdiction to a court. The law making power whether it is Congress or the legislatures of the various States clothes the courts with jurisdiction; the parties go to the courts having jurisdiction and their consent cannot confer or clothe courts with jurisdiction. That is the province of the law making power and consent of parties cannot take the place of the law making power, so far as conferring jurisdiction upon courts established, either by Acts of Congress or the Constitution of the United States. If the courts have no jurisdiction over the subject matter of the suit, consent of parties engaged in a litigation in that court, so far as it effects jurisdiction, is a nullity. It is perfectly competent for Congress to confer upon the defendant a personal exemption or a personal privilege, exempting the defendant from being sued in certain courts and we think the provision, found in Sect. 23 b of the bankrupt act is of such a character. It does not profess to confer jurisdiction upon any courts whatever but as has been held in the Bardes vs. Bank case, supra, is a limitation. It provides the courts where, or in which, suits by the trustee shall be brought and assumes, that, so far as the district court is concerned, jurisdiction is already conferred upon that court by Sec. 2 of the Act. This section must be construed, so as to find a grant of jurisdiction under the various provisions of the Act. The grant of jurisdiction in Section 2 is to the District Court, subject to this limitation and this section

2 is the only section in the act granting jurisdiction to any court to entertain any suit whatever.

This section 23 b plainly assumes that the district court has jurisdiction and the proviso gives to the defendant a personal exemption to being sued in the court having jurisdiction EXCEPT WITH HIS CONSENT. Otherwise, you have Congress passing an act containing the absurd provision that a defendant could by his consent confer jurisdiction upon a court over the subject matter of a suit.

Congress has frequently provided a personal exemption to defendants from being sued in certain courts or in certain districts, but in no Act that we are familiar with, has it been allowed for the defendant's consent to confer jurisdiction on a Court or the parties to a suit, by their consent, confer jurisdiction upon a court, where without that consent the court would be wholly without jurisdiction, over the subject matter of the suit.

An illustration of this principle is found in the acts of Congress of 1789 (1 Stat. at Large, 73); Act of Congress, February 28th 1839 (5 Stat. at Large, 321) and in the present Judiciary Act of 1887 (24 Stat. at Large, 552) as amended in 1888 (25 Stat. at Large, 434) and also the act relating to suits against National Banks, under National Bank Act of June 3rd 1864 (13 Stat. at Large, 99) and the act to correct Errors etc. February 18th 1875 (18 Stat. at Large, 316-320).

The act of 1887 as amended in 1888 provide:

> "No civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other District than that whereof he is an inhabitant."

Yet in all of the cases decided by this court, it is held that,

> "The right to insist upon suit only in the district is a personal privilege, which the defendant may waive and which he does waive by pleading to the merits."
>
> *St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127.*

Under the statute, Act of February 18th 1875 it is provided with regard to suits against National Banks:

> "That suits, actions and proceedings against any association under this title may be had in any circuit district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Mr. Justice HARLAN, in delivering the opinion of the court in the case of First National Bank of Charlotte, N. C. v Morgan, 132 U. S. 141 says:

> "No reason can be suggested why one court of a state, rather than another, both being of the same dignity, should take cognizance of a suit against a National Bank, except the convenience of the bank. And this consideration supports the view that the exemption of a National Bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary."

Upon a consideration of the provisions in section 23 (b) it will appear that they are not near so strong or sweeping as the acts of Congress above mentioned and in view of what the Court has said in the cases cited

supra, we think that this provision confers upon the defendants a personal exemption only which may be waived or exercised as can be done in other cases.

The appellants in this case have made a general appearance and this general appearance waives any objection and they are therefore properly in court.

We submit they have made a general appearance:—

First:— By filing or demurrer to the bill, for lack of equity therein, and claiming that the remedy of complainant was at law and not in equity.

Second:— By filing an answer to the Supplemental bill in this cause.

Third:— By filing affidavits and contesting the appointment of the Receiver, as appears by the record on page 16.

First:—The appellants, Wall & Huske, BEFORE DEMURRING TO THE JURISDICTION TO THE COURT TO PROCEED WITHOUT THEIR CONSENT, demur to the proceedings on the equity side of the docket and this plea or demurrer is in these words—as appears in the record at page 14:

> "Defendants specially appearing under protest of the purpose of this plea and for no other, say: "That the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear and adequate remedy at law to recover same from these defendants and is not entitled to evoke the equitable jurisdiction of this court to enforce the right, and that this Honorable Court, sitting as a court of Equity has no jurisdiction to hear and determine the question as a court of equity."

This demurrer to the equity in the bill makes the appearance, a general one.

> "The rule to be extracted from the decisions on the subject as to when a special appearance is converted into a general appearance, is, that where the defendant appears and asks some relief which can only granted upon the hypothesis that the court has jurisdiction of the cause, it is a submission to the court as completely as if he had been served with process, whether such appearance, by its terms, be limited to a special purpose or not."

Enc'y Pleading and Practice. Vol. 2 page 625.

Mr. Justice FAIRCLOTH (Late Chief Justice) says in the case of McMinn v Hamilton, 77 N. C. 300:—

> "Where a court has no jurisdiction of the subject matter, the objection can be taken at any time, and indeed as soon as this fact is discovered, the court MERO MOTU will take notice of it and dismiss the action. But if it has jurisdiction of the subject matter and the venue is wrong, the objection must be taken in apt time: and if the defendant pleads to the merits of the action, he will be taken to have waived the objections. HE CANNOT HAVE TWO CHANCES."

The Supreme Court of Wisconsin in the case of Laws v Stringham, 14 Wis. 222, says:

> "The reason that under such circumstances a special appearance is converted into a general one is, that otherwise the defendant would be given an advantage: after objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and, if it resulted

> in his favor insist upon the judgment as good for his benefit; but if it resulted against him, he could set it all aside upon the ground that he had never been properly before the court at all. If the party wishes to insist upon the objection he is not in court, he must keep out for all purposes except to make that objection."

The demurrer to the bill for lack of equity was a general appearance and notwithstanding, in the same pleading, all filed at the same time, the appellants demur to the jurisdiction of the court over their persons, they are in court for all purposes.

> "Any challenging the sufficiency of a pleading is a general appearance; by interposing a demurrer to the complaint or declaration, the defendant makes full appearance."
>
> *Enc'y of Pleading and Practice, Vol. 2 page 645.*
> *Hale v Continental Life Ins. Co. 12 Fed Rep. 359.*

It has been held by this court in the case of New Jersey v New York, 6 Pet. 283, Chief Justice MARSHALL delivering the opinion, that a demurrer to the jurisdiction of this court to entertain a suit between two states, is a general appearance by the defendant.

In the case of Jones v Andrews, 10 Wall. 327, the defendant was sued out of the district in which he was a resident. Mr. Justice BRADLEY, delivering the opinion of the court construing the act of February 28th 1839, (5 Stat. at Large, 321) says:—

> "In this case, Andrews was a necessary party, and he was not a resident of the district and was not served with process; but he voluntarily appeared. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds.

(1) That it did not show such facts in regard to the citizenship or residence of the defendant as to give the court jurisdiction. (2) That it contained no equity. Whether if he had made the motion on the first ground alone he would waive his personal exemption, it is not necessary to decide. His motion to dismiss for want of equity was clearly a waiver and he was properly required to answer the bill."

In the very recent case of St. Louis and San Francisco R. Co. vs. McBride, 141 U. S. 127, where the defendant filed a demurrer on three grounds, as follows:

(1) Because the court had no jurisdiction of the person of the defendant.

(2) Because the court has no jurisdiction of the subject matter.

(3) Because the complaint does not state facts sufficient to constitute a cause of action.

Mr. Justice BREWER, delivering the opinion of this court says:—

"Neither can the other contention of the plaintiff in error be sustained. Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise to question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based upon three grounds—two referring to the question of jurisdiction and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction,

SUCH APPEARANCE WAIVES NOT ONLY ALL DEFECTS IN THE SERVICE, BUT ALL SPECIAL PRIVILEGES OF THE DEFENDANT IN RESPECT TO THE PARTICULAR COURT IN WHICH THE ACTION WAS BROUGHT."

In addition to the foregoing authorities from this court the following cases from the Supreme Courts of the different States hold the same.

Protective Life Ins. Co. vs. Palmer 81 Ill. 88.
Kegg vs. Welden 40 Ind. 550.
Knight vs. Law 15 Ind. 374.
City of Crawfordsville vs. Hay 42 Ind. 200.
Chapin vs. Fulkerson 95 Ky. 577.
Evans vs. Iles 7 Ohio St. 233.
Myers vs. Smith 29 Ohio St. 130.
Coffee vs. City of Chippewa Falls 36 Wis. 121.
Ency. of Pleading and Practice Vol. II page 628.
Beach Modern Equity Practice Vol. I page 261.

A demurrer on the ground of want of equity in the bill and want of jurisdiction in the court, over the person of the defendant, waives the objection to the jurisdiction of the court.

Merrill vs. Haughton 51 N. H. 61.
Elliott vs. Lawhead 43 Ohio St. 171.

In the case of Gilbert vs. Hall 115 Ind. 549, the Supreme Court of Indiana, says:—

> "A special appearance may be entered for the purpose of taking advantage of any defect in the notice or summons or to question the jurisdiction of the court over the person in any other manner; but filing a motion or demurrer which pertains to the merits of the complaint or petition, constitutes a full appearance, and hence a submission to the jurisdiction of the court."

In the case at bar the appellants, strenuously insisted upon the first demurrer as will appear by the opinion rendered by his Honor Judge EWART, Vol. 99 Fed. Rep. 546 and also in the Circuit Court of Appeals as appears by the opinion of his Honor Judge WADDILL.

This demurrer is in effect a motion of non-suit and appellants have taken two chances; one, as to equity arising upon the facts stated in the bill, and the other as to the jurisdiction of the court to proceed without their consent. Upon a failure of the courts to sustain the first contention, they have resorted to the second, but in having insisted upon the demurrer to the equity in complainant's bill, they have submitted to the jurisdiction of the courts and have waived their personal privilege. When they challenged the equity in the bill, they necessarily submitted to the jurisdiction of the court by all of the authorities, and they were properly ruled to answer the bill.

Second:—It is argued by the appellants, in what they call their "Reply to the Brief of Appellants," that it was competent for them to file their demurrer to the jurisdiction of the court to proceed without their consent, and after the demurrer was overruled by the court, note their exception, come into court and contest the case. In support of this contention, they cite Southern Pacific Co. vs. Denton, 146 U. S. 202; Hardness vs. Hide 98 U. S. 476; In Re Railroad Co. 164 U. S. 633; Steamship Co. vs. Tugman 106 U. S. 118 and other cases. We fail to see the application of the principle decided in those cases to the case at bar. It is perfectly competent under the practice to note exceptions to the court overruling demurrers to the jurisdiction and this exception is saved upon appeal. In the case at bar, that was not done. It does not so appear by the record. The record flatly contradicts such a contention. The

answer and the demurrer to the equity in Complainant's bill appear in the same pleading. In fact, the record shows, after the appellants answered the supplemental bill, they then filed the demurrer to the equity in complainant's bill and as a last part of the pleading, they put in the demurrer to the jurisdiction of the court to proceed in the cause, except with their consent and then for the first time claim that they have not consented. See record pages 13, 14 and 15.

This pleading concludes with a prayer for the "judgment of this honorable court whether they shall be compelled to make any further or other answer to the bill of complaint herein or to this motion for the appointment of a receiver or for an injunction or for any of the matter and things therein contained, and pray that the motion of complainant for the appointment of a receiver and for this injunction be denied by this honorable court, and that they be hence dismissed with their reasonable cost in this behalf sustained.

"And further defendant prays that the original bill of complaint filed herein be dismissed by this honorable court and that these defendants recover their reasonable cost in this behalf sustained."

The affidavits upon which the appointment of a receiver was considered were all filed at the same time and as a part of the same pleading as appears by page 16 of the record.

If appellants did not intend to make an appearance in the cause, they should have filed their plea in abatement, and upon same being overruled, noted their exception or appealed if they so desired. That has been always the practice in the courts and has received the

sanction of the court in the case of McLish vs. Roff 141 U. S. 662. and under such circumstances the appellant lose no rights. But in the case at bar, all of the pleadings were filed at one and the same time, all considered together—all considered by the court at one and the same time and no exception appears in the record and in fact none was taken. An inspection of this pleading shows that it does not admit all of the facts as contended by appellants. In fact it denies everything set out in the supplemental bill, except trifling matters of form, alleged therein.

They further contend that the time for pleading on their part had not arrived, and that therefore this is not a pleading to the merits. This is not true in fact nor does it so appear by the record. The last prayer in the pleading prays the judgment of the court as to whether they shall plead further and also concludes with a prayer for the dismissal of the bill.

There was never but one order made by the district Judge—EWART. The same order which appointed the Receiver in the suit and authorized him to reduce the property to money was the order which overruled the plea or demurrer. (See Record page 16.) It is elementary that a defendant cannot demur and answer, at the same time; that the answer will supersede the demurrer. Also the defendant can not demur to the jurisdiction of the court to appoint a receiver and at the same time file affidavits contesting the appointment of a receiver on the merits. The appellants did so in this cause and the court properly, as we submit, disregarded the demurrers and appointed the receiver.

The appellants cite as authority the case of In re Nugent recently decided by the Circuit Court of Appeals of the sixth Circuit, 105 Fed. Rep. 581 and while

the record in that case shows that Nugent did not go into court voluntarily and many other things not shown in this record which an examination will disclose, we will not discuss same, as the cause has just been removed to this court by certiorari and the parties in said suit are represented by learned counsel and we do not think under the circumstances that the case can be cited as authority by any one.

We think that if the appellants answered the supplemental bill, setting up matters of fact to be passed upon by the court, that this would be a general appearance, notwithstanding they claim in the same answer or pleading, that, THEY DO NOT CONSENT TO THE JURISDICTION OF THE COURT, and it only remains to be seen whether this pleading is an answer.

This pleading on pages 13, 14 and 15 of the record is divided into two separate and distinct parts or sections. The first part or section contains the answer and the second part contains the demurrers.

The facts under which this pleading was filed, were: Cox, trustee, filed his bill in the district court. The stock had been locked up and in the possession of the receiver and other orders of the court and was deteriorating in value. The receiver was not authorized to sell the stock and hold the moneys and after the subpoenas were issued and served upon the appellants, Cox, trustee, then filed his supplemental bill before Judge EWART, and attached thereto, a copy of the original bill. Judge EWART acting upon these papers, gave the defendants notice to show cause before him at Charlotte, N. C., on December 18, 1899, why a receiver should not be appointed and ordered to reduce the property to money, and hold the proceeds thereof. The hearing was continued from day to day until on January 6th,

1909, in compliance with his honor's order, this pleading was filed. See record page 13.

This pleading was considered as an answer by Judge EWART, that is, the first part as an answer and the second part as a plea or demurrer, as appears by his order on page 16 of the record, which is in part, as follows:—

> "In the above entitled cause, the plea to the jurisdiction of the court filed by respondents is overruled. On the reading and consideration of the bill of the plaintiff AND ANSWER of the respondents, IT IS ORDERED, ADJUDGED AND DECREED, ETC."

The second part of this pleading has always been considered as demurrers to the equity in the bill and to the jurisdiction. The first section has been considered by counsel for appellee and by the courts as an answer to the supplemental bill.

The office of a plea in equity, as stated in the Encyclopoedia of Pleading and Practice, Vol. 16 at page 587, is as follows:—

> "A plea in equity is a pleading by which the defendant sets up a single fact, or several facts converging to one point, as a cause why the suit should either be dismissed, delayed or barred. It presents some distinct fact which admitting the bill to be true, of itself creates a bar or avoids the necessity of going into the the evidence at large."

Mr. Justice BREWER in rendering the opinion of the court in the case of the United States vs. California and Oregon Land Co. 148 U. S. 31, 38, says:—

> "And the unquestioned right of a defendant in

an equity suit is to let the facts averred in the bill go unchallenged and by a plea set up some special matter, which if established and sufficient, will defeat any recovery."

Is there any special matter set up in Section I of this pleading which will prevent the complainant from his recovery, if established and sufficient? Certainly not. When we analyze this pleading, it appears as nothing more nor less than a complete, full and sufficient answer to the supplemental bill, filed by Cox trustee.

It will appear by an inspection of this pleading, that both are entitled in the same cause and in exactly in the same manner. The allegations in the bill, are answered sereatim—in this pleading.

The first allegation in the supplemental bill of complaint, as appears by page 2 of the record:—

"Your orator Walter O. Cox, trustee of the estate of W. H. Gilberlt, trading etc. and a citizen and resident of said state of North Carolina and District aforesaid, shows unto your Honor that he has already filed in the District Court of the United States for the Western District of North Carolina, sitting as a court of Bankruptcy, the court having jurisdiction of J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, being citizens of said state and inhabitants of said district, a bill of complaint against the said John D. Wall and T. W. Huske, partners, trading as Wall & Huske, seeking to set aside a certain sale of the stock of hardware made by the bankrupt W. H. Gilbert to the said J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, and also for the purpose of cancelling of a certain paper writing

purporting to be a bill of sale or deed, executed by the said bankrupt to the said respondents, under date of October 11th, A. D. 1899, and also for other relief as appears more fully by an inspection of the original bill of complaint filed in said cause. That the property so transferred or sold, to-wit: the stock of hardware, store fixtures and accounts, is within this district and in the jurisdiction of this court. Your orator respectfully refers to the said bill of complaint for a more particular statement of the contents thereof, and your orator files herewith a true copy of said bill of complaint and prays that your Honor will take the same as a part of this ancillary bill.

"Your orator further shows that all the state-statements contained in said bill are true as he is informed and verily believes and he repeats the same herein."

The answer of the appellants, Wall & Huske, to this allegation is found on page 13 of the record, and is as follows:

"That they admit the complaintant filed in the District Court of the United States for the Western District of North Carolina, a bill of complaint against defendants seeking to set aside a certain sale of the stock of hardware made by W. H. Gilbert to the defendants; all of which will appear by said bill of complaint and an inspection thereof. The defendants admit that the stock of hardware, store fixtures and accounts is within this district, to-wit: is situated in the city of Winston, N. C., in a storehouse and warehouse therein."

The second allegation in the supplemental bill, as appears in the record page 11, is as follows:

> "And your orator shows to your Honor that the process in said bill has been duly issued and served upon the respondents therein named, J. D. Wall and T. W. Huske, partners, trading as Wall & Huske, by the marshall of this Honorable Court."

The answer of the Appellants to this second allegation appears in the record on page 14, and is in the following words:

> "Defendants further admit that a subpoena has been duly served upon these defendants, issued by the District Court of the United States aforesaid at the time of the filing of the bill of complaint."

The third allegation in the supplemental bill of complaint as appears on the record pages 12 and 13, is as follows:

> "And your orator further shows that the property in question is a large and valuable stock of hardware, store fixtures and accounts, and the said property as aforesaid, is deteriorating in value and damaging by reason of being stored in the building known as the Vaughn building in the city of Winston, N. C. and your orator further shows to your Honor that the cost of storage amounts to about $50 per month, besides the other necessary expenses, such as insurance, etc."

The answer to the third allegation is found in this pleading on page 13 of the record and is in these words:

"The defendants further admit that the stock of hardware, store fixtures and accounts is of value as appears in an answer of these defendants to which reference is made and which will be duly filed in this cause, should the court demand the filing of said answer after hearing the motions, and demurrers and pleas of these defendants as will be presented.

"Defendants admit that said property is deteriorating in value and damaging by reason of being locked up in a store house and warehouse under the restraining order of the court, obtained at the instance of creditors of the baukrupt W. H. Gilbert, the creditors aforesaid being the same as obtained the appointment of complainant trustee of W. H. Gilbert, bankrupt, and who obtained the issuing of the subpoena and obtained the filing of the bill of complaint in the said action."

The fourth allegation in the supplemental bill of complaint appears on page 12 of the record and is in the following words:

"And your orator further shows that no inventory has ever been taken of the property and there is no way known to your orator to come to a fair and equitable valuation of said property."

The answer to the fourth allegation on the part of the appellants is found in this pleading on page 14 of the record as follows:

"Defendants deny that no inventory has ever been taken of said property, and that there is no way to come to a fair and equitable value thereof."

The fifth allegation of the supplemental bill is as follows:

> "And your orator further shows that respondents are threatening to dispose of, sell and intermingle, if they are permitted to do so, without taking or permitting to be taken any inventory of said property."

The answer of appellants to this allegation is as follows;—(Record page 14).

> "Defendants say that they are not now threatening to dispose of or sell said property by reason of the injunction of this court; that they have not intermingled the goods purchased by them from W. H. Gilbert with their own stock of hardware, and that the only removal of goods which has been made from the one store to the other APPERS FULLY BY EXHIBITS 1, 2 AND 3 HERETO ATTACHED."

The sixth allegation in the supplemental bill is as follows: (Record page 12).

> "That the respondents are men of small means, having bought or pretended to buy said stock of goods, fixtures and accounts wholly on credit, and cannot respond to your orator in damages, even if the true inventory and value of the said stock was known, by which means your orator will suffer irreparable loss and damage if the said stock is permitted to be sold, intermingled or otherwise disposed of by the said respondents."

The answer to the seventh allegation of the supplemental bill is as follows:—(Record page 14).

> "Defendants admit that they are men of no very large means, but aver that they are respon-

sible and able to pay any damages and amounts which may be adjudged against them by this court or any other court by reason of this disposition of said goods.

"Defendants deny that they have pretended to buy the said property from the said W. H. Gilbert, but allege and aver that they have actually purchased and paid for same as appears by their answer to which reference is made aforesaid."

"Defendants deny that the complainant will sufier any irreparable loss or damage if this stock is permitted to remain in possession of defendants and disposed of by them. And in support of this plea of defendants they respectfully refer to their answer in aid of this their plea."

From the foregoing analysis of this pleading, it appears that every allegation of the supplemental bill of complaint has been answered either admitting the truth thereof or denying it. The appellants call this pleading, A PLEA, but the court will look throught the form and decide from the substance whether it is a plea or a full and complete answer. Calling a pleading by one name does not change its character and when it appears so fully as this does, that this is an answer duly filed in the cause, there can be no question but that the appellants have made a general appearance. Every issue which can possibly arise on the trial of this cause, is raised in this supplemental bill of complaint and this answer.

It is a pleading to the merits of the controversy, REFERS PARTICULARLY TO THE ANSWER OF THE DEFENDANTS IN THE SUIT, which by such reference this answer to the original bill becomes a part and parcel of this pleading.

"Any pleading to the merits by means of an answer, plea, or by any informal manner attacking plaintiff's case is a general appearance."

Enc'y Plead. and Prac. Vol. 2 pg. 636.

The Supreme Court of California, in considering the case of In re Cohen, 5 Cal. 494, where the District Court ordered A and B to be served with a rule to show cause why they should not be commanded to deliver to a receiver, appointed by the court, in a cause to which they were not parties, certain personal chattels held by them, who, in obedience to said rule, appeared and contested the matter before said court,

Held, "That when they appeared and filed their answer to this rule, the court acquired full jurisdiction over the subject matter of the suit and the persons of the defendants."

To the same effect see Henderson vs Carbondale Coal Co. 140 U. S. 25 at page 40.

Mr. Chief Justice FULLER in delivering the opinion of this Court in the case of Texas & Pacific R. Co. vs Cox, where a Receiver had been sued in a district whereof he was not a resident, had interposed a demurrer to the jurisdiction and had filed an answer as in the case at bar, uses the following language:—

"It is said further that jurisdiction over the receiver, personally was lacking because the defendant Brown resided in the Northern District of Texas and defendant Shelden was an inhabitant of Louisiana; and that under the Act of 1887 the action could not be instituted in a District whereof neither of the defendants was an inhabitant. If the suit be regarded as merely ancillary to the Receivership, the objection is without force, but irrespective of that, this im-

munity is a personal privilege which may be waived. The defendant not only demurred but answered and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances they could not therefore challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong District."

Texas & Pac. R R Co. v Cox, 145 U. S. 593.
Fitzgerald & Mallony Construction Co. v Fitzgerald 137 U. S. 98.
First National Bank v Morgan, 132 U. S. 141.

(III)

The defendants made a general appearance when they filed affidavits before the court below and contested on the merits, the appointment of a receiver in the equity suit.

The record shows on page 16,

> "The motion for receiver and injunction was heard before his Honor Judge EWART at Winston, on the 9th day of January 1900 on the bill of complaint, supplemental bill of complaint of Cox, trustee, and the plea and demurrer of Wall & Huske, AFFIDAVITS OF BOTH SIDES IN SUPPORT OF AND AGAINST MOTION OF RECEIVER, ARGUMENT OF COUNSEL WAS MADE ON BOTH SIDES."

The affidavits filed are not sent up as a part of the record but his Honor Judge EWART in appointing the receiver finds the following facts from the affidavits so filed; (See Judge EWART'S opinion as duly reported

in 99 Fed. Rep. 546 at page 550 or on page .... in the appendix of this brief.)

> "In the case at bar, it appears that this is a stock of merchandise, subject to deterioration and fluctuation in price; that no inventory of the property has been taken and until this is done no correct estimate and value can be placed thereon. That respondents owe $8.000.00 to the Wachovia National Bank of Winston, and that their property is listed at a little more than $9.-000.00, nearly all of which is personal property. In view of these facts in the judgment of the court, it is proper that a receiver should be appointed untill all the equities of the parties interested should be determined by a final decree."

It has been held by the Court of New York, in the case of Cooly v Lawrence, reported in 12 How. Pract. 176, 12 Sup. R. Ct. 605:

> "By appearing by counsel and opposing a motion for an injunction, reading affidavits in opposition to such motion, filing the same with the names of their Attorneys endorsed thereon, defendants appeared unconditionally and submitted themselves to the jurisdiction of the court."

The Sapreme Court of Pennsolvania in the case of McGeorge v Chemical Manufacturing Co. 141 Pa. St. 525, held,

> "That filing an affidavit of defense, the defendant made full appearance to the action."

We respectfully submit that the appellants, by appearing and filing a demurrer to the equity in the bill as appears by the record, made full appearance to the

action, notwithstanding they demurred at the same time and in the same pleading to the jurisdiction of the court to proceed without their consent.

Second:—That the appellants, having filed an answer in the cause to the supplemental bill, raising questions of fact to be passed upon by the court, simultaneously with a demurrer to the jurisdiction of the court to proceed without their consent, they made full appearance in the action.

Third:—That the appellants by filing affidavits and contesting the appointment of receiver, notwithstanding they demurred to the jurisdiction of the court AT THE SAME TIME to entertain the suit without their consent, made a general appearance in the action and were properly ruled to answer the bill.

That having made a general appearance as above set out, they waived any and all rights, privileges and personal exemptions which was conferred upon them by section 23 (b) of the bankrupt act.

That this consent, which is required by section 23 (b) as we submit, does not have to be made "In writing, signed, sealed, and delivered and in North Carolina recorded," but that any course of conduct which under the acts of 1887 as amended by the act of 1888, would amount to a waiver of rights allowed under said acts to a defendant when sued out of his district, would amount to consent under section 23 (b) and that for this reason the first question should be answered in the affirmative.

SECOND QUESTION.

SAID DISTRICT COURT HAVING ADJUDICATED BANKRUPTCY ON ACCOUNT OF AN ALLEGED FRAUDULENT TRANSFER OF THE BANKRUPT'S PROPERTY, AND HAVING APPOINTED A RECEIVER TO HOLD THE ESTATE THUS CONVEYED, HAD IT, IN SAID PROCEEDINGS INSTITUTFD EITHER BY THE ORIGINAL PETITIONERS, THE RECEIVER OF THE COURT, THE BANKRUPT'S TRUSTEE, OR OF THE COURT'S OWN MOTION, JURISDICTION TO BRING IN THE ALLEGED FRAUDULENT TRANSFERREE OF THE PROPERTY THUS CONVEYED IN THE COURT'S POSSESSION, AND DO FULL AND COMPLETE JUSTICE IN ONE LITIGATION ?

In the brief of the appellants and also in what they call their reply to this brief, it is earnestly insisted that this question is not raised by the record. In making up this record, counsel was heard fully by the Circuit Court of Appeals, where the full record and all the facts were under consideration, and notwithstanding counsel's objection, the court found the facts of the case before them, did raise the question submitted thereby. It is even intimated by counsel that the Circuit Court of Appeals of the Fourth Circuit had certified this question, in order to get the opinion of this court, to be used by them in another cause. We fail to see any evidence of such intention and we do not think same can be imputed to the learned Judges composing the Circuit Court of Appeals.

In order, more effectively to escape the consideration of this second question, counsel for appellants, in his argument proceeds upon a statement of facts, made by himself, and then proceeds to say that the law is as he says it is. In a more homely phrase, he laboriously builds up his "man of straw" and then proceeds to knock him down. The questions certified are most certainly a part of the record and most material part of same, and this second question finds certain fundamental facts, to-wit:—"SAID DISTRICT COURT HAVING ADJUDICATED BANKRUPTCY ON ACCOUNT OF AN ALLEGED FRAUDULENT TRANSFER OF THE BANKRUPT'S PROPERTY AND HAVING APPOINTED A RECEIVER TO HOLD THE ESTATE THUS CONVEYED,"* ****** "HAD THE PROPERTY THUS IN THE COURT'S POSSESSION" and then, from this summary of the facts, proceeds to propound the question whether or not the Court, thus situated in relation to the roperty, had jurisdiction to do full justice to all litigants in one litigation.

We think counsel's view of both the facts and the law is erronous and we submit:—

First:—That the Circuit Court of Appeals, in this second question, in certifying the same, has found as a fact that a receiver was appointed in the bankruptcy proceedings and that the district court sitting as a court of bankruptcy, had the property in its possession; that this finding of fact, so certified, is binding upon this court.

Second:—That while the record certified to this court does not contain the order of the district court appointing the receiver, in haec verbis, yet it sufficiently appears from said record, that a receiver was ap-

pointed by the bankrupt court and that the said court had the property in its possession.

The record certified to this court does not profess to be the whole record before the Circuit Court of Appeals.

For instance, the original petition of creditors on page 1 of the record does not purport to be the entire petition of creditors; the petition of creditors for the appointment of the receiver and the issuance of the restraining order,—the adjudication of W. H. Gilbert, as a bankrupt,—the appointment and qualification of Cox, trustee, of the estate,—the subpoenas issued by the court in the ancilliary suit,—the interrogatories to the bill,—the bond filed by Cox, trustee, to maintain this suit in the District Court,—the affidavits upon which the appellants and appellee contested the appointment of the receiver in the ancilliary suit,—the exhibits mentioned in the answer of appellants on page 14 of the record,—the schedules filed by the badkrupt in which he claimed this property as his own,—the orders of the court for the examination of both the bankrupt and the appellants before the court,—the answer of the appellants referred to in the pleading called a "plea and demurrer" as appears on page 14 of the certificate and which was actually filed and is on file now,—the voluminous evidence taken by the court in the cause,—and in fact many other orders made and things done in the bankruptcy proceedings do not appear in this record either in part or in whole. It is argued that the greater portion of the orders made are referred to, and none of them appear in full and from that circumstance it is to be inferred that this order was never made, and if it had been made, it would have so appeared. As a matter of fact, it is not so referred to but it appears by this finding of the fact and by the record in the certificate as we shall notice later, that the ORDER WAS DULY

MADE. The record in this cause is fuller and more complete than is usualin certificates, but it was expressly made so in order that the court could intelligently pass upon the question of consent of defendants as propounded in the first question. This record, as full and complete as it is, does not show and we submit should not show, all of the orders and decrees in the bankruptcy proceedings.

These orders were made in the bankruptcy proceedings proper and the orders which the appellants are seeking to have reviewed in the circuit court of appeals, were orders made in the ancillary equity suit of Cox, trustee, v Wall & Huske, and the orders and things done in the bankruptcy proceeding, not having been appealed from, APPEARS NOW AS FACTS FOUND BY THE CIRCUIT COURT OF APPEALS IN THIS SECOND QUESTION. The record in the suit of creditors v Gilbert, in the bankruptcy proceedings, was entirely foreign to the matters considered by the Circuit Court of Appeals, and whether the fact that a receiver was appointed therein, appeared by record in that court or by admission of counsel in the argument in that court, this court will assume that the findings of fact by the Circuit Court of Appeals and certified by them are the truth, notwithstanding the contrary is maintained by counsel interested in the cause, and this Court will be governed thereby.

To show the absurdity of counsel's contention, we will ask the court to note, that none of the orders in the bankruptcy proceedings proper appear in the record. The order adjudicating Gilbert a bankrupt and the ground upon which the court adjudicated him a bankrupt does not appear anywhere. The order appointing Cox, as trustee, and the bond filed by him to maintian the suit as required by the Acts of Congress and the

rules of the District Court, and in fact none of these orders appear and the appellant's counsel could with just as much force ask the court not to consider either of these questions because of such irregularities, as to insist that the court will not pass upon the second question for the reason given. The fact that the receiver was appointed appears unmistakably in this second question, and we think the court should pass upon both questions.

We do not think under the practice and the rules, that it is either proper or necessary for the record to show affirmatively, facts, which the court in certifying the questions FIND TO BE FACTS IN THEIR CERTIFICATE.

It seems that counsel, in arguing this case, has fallen into the error of considering this case as if it was upon appeal in this court. Upon an appeal or writ of error, the whole record must be sent up to this court, whereas in a certificate, it has been expressly held that the whole record should not be sent up.

Cincinnati H & D R R Co. v McKeen 149 U S 259.
Grazer v Faurot 162 U. S. 435.

But in this case, counsel for the appellants insist that not only the whole record in this cause should be before the court but also the record in an entirely different cause. That it is error for the Circuit Court of Appeals to put in the question, a finding of fact. No doubt it was done for the convenience of this court, to enable them to see exactly what the contention of the parties were, as well as to keep from encumbering the record with extraneous matter which could not possibly effect the result.

It was held that the certificate will be dismissed when the questions imposed upon this court the labor of de-

termining the whole case and all questions of law which may be lurking in the record.

Cross v Evans, 167 U. S. 60.

The Circuit Court of Appeals for the second circuit, in considering what should go into the record in the case of Signafus v Porter, 85 Fed. Rep. 689, say, that under the rule it it is fundamental facts which are to be STATED and not the evidential facts from which the fundamental facts are found.

Jewell v Knight 123 U. S. 426.
U. S. v Union Pacific R. R. Co. 168 U. S. 505.
Grazer v Faurot Supra.

The Circuit Court of Appeals, having certified as a fact that the Act of Bankruptcy in this case was this fraudulent transfer and that the court appointed a receiver in the bankruptcy proceeding and the court had the property in its possession, this court will take these facts as found and the statements contained in the certificate as conclusive.

Fire Ins. Asso. v Wickham 128 U. S. 426.
Dublin Township v Milford etc. 128 U. S. 510.

But it is further argued that this position is contradicted by certain recitals in the certificate and counsel quotes from the record to shqw that Wall & Huske was in possession of the property and not the court. We have already in the former portion of this brief, called the attention of this Court to counsel's method of quoting the record and we will have to do so again. The phrase to which he refers, has absolutely nothing whatever to do with the stock of goods in the hands of the Receiver. That refers to the small portion of the property in the possession of the appellants, which they succeeded in getting hold of, before tne institution of the proceeding

in bankruptcy and as to that a reference to the page from which he quotes, it will be noticed that the record expressly states that "At the expiration of the injunction, as per order of Judge EWART, of November 6th 1899, counsel for Wall & Huske agreed that the stock of goods should not be removed until Cox, trustee, should qualify and bring suit, as if injunction in force." See Certificate page 13.

This recital is only the second paragraph below what is quoted in brief of the appellants and shows how that was; that in regard to the small amount of goods they had been able to get hold of, the court said to them, "hands off" and this was obeyed even after the qualification of Cox, trustee.

Judge WADDILL, delivering the opinion of the Circuit Court of Appeals, which is expressly made a part of the certificate, by reference on page 17 of the certificate, uses this language: (Vol. 101 Fed. Rep. at page 410, appendix of this brief, page ....)

> "The title to the property alleged to have been fraudulently conveyed by the express terms of the act, as of the date of the adjudication, vests in the bankrupt's trustee upon the assumption of the transfer being void and THE BANKRUPT COURT HAS, AS AUTHORIZED BY THE ACT, APPOINTED A RECEIVER TO SEIZE AND TAKE CHARGE OF THE PROPERTY INVOLVED, AND NOW IN FACT HOLDS THE SAME. Can it be seriously claimed that in such a case, with an officer of the court before it with property thus vested in him and the same seized by the court and brought in for the benefit of creditors, the court is powerless to afford relief either to its own officer, or to the creditors of the bankrupt, because of the rights of an alleged fraudulent transferree are involved, and

that on that account the hands of the bankrupt court should be stayed until the question of the transferree's rights can be determined in a state court? This cannot be the law. THE PROPERTY IS IN CUSTODIA LEGIS, and all persons having interest in it or claiming title to it have necessarily to come INTO THE COURT HAVING IT IN CHARGE. Any other course would be unheard of. It would be to except the United States District Court from the otherwise universal and fundamental rules, principles, and practices of courts of justice in respect to property lawfully under their control."

A casual reading of this opinion will show conclusively that the exact point in the case was the fact that the court, not the district court but the bankrupt court, had the property in the possession of a receiver and that the possession of this receiver was the possession of the court. That the property was in custodia legis, not in the district court, but as a court of bankruptcy, the identical court in which this equity suit of Cox, trustee, v Wall & Huske was brought. It is argued that the learned Judge used the words District Court and Bankrupt Court interchangeably; that some time he would call the court by one name and then again he would call it something else. A reading of this opinion, will show conclusively that Judge WADDILL, when speaking of a Receiver, meant the Receiver appointed by the bankrupt court in the bankruptcy proceedings. We do not think the court would have been guilty of the absurd and nonsensical judgment, OF ATTEMPTING TO SUPPORT THE JURISDICTION OF THE DISTRICT COURT, IN THE SUIT WHERE ITS JURISDICTION WAS CHALLENGED APPOINTED A RECEIVER. We think that view of

the matter is fair and just to the Court below, especially after they have certified, the only ground upon which this case was decided before them to this court for its advice thereon. This was the main point in the case. This was the reason and the only reason given in the decision for upholding the jurisdiction of the court.

While in the case of In Re Baundenine decided by the Circuit Court of Appeals for the second circuit, reported in Vol. 101 Fed. Rep. page 574 and the case of Hall v Kincell decided by the Circuit Court of Appeals of the ninth Circuit reported in Vol. 102 Fed. Rep. page 301 the jurisdiction of the District Court was sustained on other grounds. Judge WALLACE delivering the opinion of the Court in the case of In re Baundenine, holds that the District Court had jurisdiction because the cause under consideration was one which arose out of the bankruptcy proceeding and that it was not such a cause of action as the bankrupt could have brought. And in the case of Hall v Kincell, the broad position was taken by Circuit Judge MORROW that the Court had jurisdiction under Section 2 of the Act and that section 23 (b) did not effect that grant of jurisdiction ; but in this case, the jurisdiction was sustained only because the Court had possession of the property and when the Court certify questions to this Court for its advice, they certify the exact question upon which they decide the case upon the former hearing.

Since it seems that because the court below has not seen fit to send up the whole record in this cause, to show that the Court and not the defendants were in possession of the property and in view of the labored argument of counsel for the appellants, insisting that the defendants were in possession and that this second question cannot be considered by this court, we will note what the appellants themselves have to say about

the possession of the property. They are on record in their answer on page 14 of the certificate, and they swear, upon their oaths, the following to be the status of affairs, when Cox, trustee, began his suit:—

> "Defendants admit that said property is deteriorating in value and damaging by REASON OF BEING LOCKED UP IN A STORE HOUSE AND WARE HOUSE UNDER THE RESTRAINING ORDER OF THE COURT OBTAINED AT THE INSTANCE OF THE CREDITORS OF THE BANKRUPT W. H. GILBERT, the creditors aforesaid being the same creditors as obtained the appointment of complainant as trustee of W. H. Gilbert, bankrupt, and who obtained the filing of the bill of complaint in said action. * * * * *
>
> "Defendants further say that they are NOT NOW THREATENING TO DISPOSE OF OR SELL SAID PROPERTY BY REASON OF THE INJUNCTION OF THE COURT, THAT THEY HAVE NOT IN ANY WAY INTERMINGLED THE GOODS PURCHASED BY THEM FROM W. H. GILBERT with their own stock of hardware, and that only removal of goods which has been made from one store to the other appears fully in exhibits 1 and 2 and 3 hereto attached."

While in this pleading it is not admitted that a Receiver was in possession of the property in so many words, yet it unmistakeably appears, that the Court at the instance of the creditors, took possession of the property and at the time the pleading was filed, January 6th, 1900, was in actual possession of same.

An argument is made by the appellants that because the bill states "Wall & Huske went into possession of the entire property aforesaid," that it shows the court

was in possession of the property. Such an argument is misleading unless the facts surrounding the transaction are taken into consideration. The transfer or bill of sale was signed by the appellant and W. H. Gilbert on the 11th day of October 1899, and they did attempt to go into possession of the stock of goods. The next day, the morning of October 12th 1899, the petition in bankruptcy was filed and the injunction issued and stopped them and the store house was locked up by the order of the court.

The other quotation from the bill relied upon by the appellants which contains an allegation requesting Wall & Huske to surrender the stock of goods and setting out their defense thereto, will appear by an inspection of the bill to be what is usually called the "charging part of the bill," and could have been omitted under Equity rule No. 21. It is purely formal so understood by the courts below and counsel and of course admits nothing.

The last quotation from the bill in the argument of the appellants refer entirely to matters which took place prior to the institution of the proceedings in bankruptcy.

As a matter of fact Wall & Huske have never been in possession of the property. Immediately after the alleged sale, the court enjoined them, then continued the injunction to the election and qualification of the trustee and appointed a Receiver to hold the property in tact. After the election and qualification of a trustee the stock remained locked up and in possession of the court. In fact so much is expressly admitted in the "reply to the brief" filed by the appellants in this cause. They say that the only distinction between this case and the case of Bardes v Bank, supra, was that

an injunction was issued. The admission shows the court was in possession of the property by means of an injunction, although, as a matter of fact at the time it was in possession by means of its receiver. Also what intermingling of stock was done, was done prior to the institution of the proceedings in bankruptcy and Wall & Huske, as appears by the certificate, and as is the truth in fact, have not been able to sell, dispose of or interfere with the property since that time on account of it being in the actual as well as constructive possession of the court.

The appellants argued that the Receivership which appears in the certificate was upon the bill in equity by Cox, trustee. That is true; but the moment that Receiver was appointed, THE APPELLANTS APPEALED TO THE CIRCUIT COURT OF APPEALS AND THAT NECESSARILY STAYED THE PROCEEINGS IN THAT BEHALF. The Circuit Court of Appeals does not refer to that Receivership at all and could not do so because the filing of the appeal or petition of review, vacated the order appointing the Receiver in the equity suit of Cox, trustee, v Wall & Huske.

The question certified to this court, is not the right of the Court to appoint the Receivership in that suit, but it is certified to this court, whether or not the court had jurisdiction to entertain a suit on behalf of the Receiver, appointed in the bankruptcy proceedings and to preserve the property until the title could be determined in the usual way. We do not think the jurisdictiction of the bankrupt court to appoint the receiver in the bankruptcy proceedings and to preserve the property in the case, is open for review. The appellants have not appealed from any order made in the bankruptcy proceedings and the question of the validity or invalidity of such an order is not before the court in any form.

The appellants argue that the appointment of the receiver in the suit of Cox, trustee vs. Wall & Huske is the Receivership referred to in the second question and that this being void, appellee is arguing in a circle. "The court having appointed a receiver because it had jurisdiction, and had jurisdiction because it appointed a receiver."

The circle is in the mind of appellants' counsel and not in the straight forward facts and sequence of this case. Under its statuatory powers (Section 2 Sub Sec. 3 and 6 of the Bankruptcy Act) the court took possession of the property by means of restraining order, injunction and receivership. Under its inherent equity jurisdiction, it will entertain ancillary proceedings looking to the administration of same. A glance at the facts of the case will sufficiently show the strength of this position. On October 11th, 1899, the appellants obtained from Gilbert a deed or bill of sale for a large stock of goods, alleged to be worth from $17,000.00 to $18,000.00. They immediately began attempting to obtain possession of these goods and intermingle same with their own stock of hardware, so that it would be impossible to distinguish this stock from their own stock. They had never taken an inventory of the goods alleged to have been purchased and in no way could the value of same be ascertained. The creditors of W. H. Gilbert on the 12th day of October, 1899, the next morning after the sale, filed a petition in involuntarily bankruptcy and obtained from the Judge a restraining order and by virtue of that restraining order, followed up by injunction and receivership, the bankrupt court took actual, manual possession of the stock of goods and the property has been in the possession of the court to this day.

Appellants also mention in their brief that on the rehearing the Judges on the bench of the Circuit Court of Appeals stated that there was a difference between voluntary and involuntary proceedings. All that was meant by that remark was the different status of the property belonging to the bankrupt or alleged to belong to him, until the adjudication. We do not understand from the opinion of Judge LOWELL, quoted so extensively in the brief of appellants in the case of In re Ward, that he differs so materially from the opinion of these Judges, Circuit Judges, GOFF and SIMONTON and District Judge, WADDILL. Every one recognizes that there is a difference in the status of the property and an argument that there is none comes with very bad grace from men who aided and abetted the bankrupt to defraud his creditors and by their active participation in the fraud, committed with the bankrupt, the act of bankruptcy upon which the adjudication was made.

In the case at bar, the appellants were men of small means as appears by their answer on page 14 of the certificate and were insolvent as appears by the findings of fact by Judge EWART, in his opinion in this cause reported in Vol. 99 Fed. Rep. at page 550 (Appendix of this brief, page——) wherein he says, in considering the advisability of appointing a receiver in the bill in equity :—

> "That they (appellants) owed to the Wachovia National Bank, of Winston, $8,000, and they listed for taxation, principally personal property, to the amount of $9,000.00."

Under the circumstances surrounding this sale, and where the alleged fraudulent purchasers were insolvent, why should not the bankrupt court, on petition of creditors, or upon its own motion, or upon petition of the

trustee, take charge of the property in the exercise of its inherent equity powers? What court of chancery would sit by idle and see this large estate pass into the possession of irresponsible men? Especially is this so, when the very act by which these men obtained possession of the property was fraudulent and done with intent to hinder, delay and defraud the creditors of the proposed bankrupt;—was the very act of bankruptcy upon which W. H. Gilbert was adjudicated a bankrupt and was the very act which defrauded the creditors of W. H. Gilbert?

The district court, in the case at bar, by the restraining orders issued and the appointment of this receiver in the bankruptcy proceedings did not pretend to pass upon either the title of the appellants or appellee. It was no summary proceeding to try title to property, which has been denied to the bankrupt court in the cases of Eyster v Gaff 91 U. S. 521; Smith v Mason 14 Wall. 419, 433; Yeatman v New Orleans Sav. Inst. 95 U. S. 764; Marshall v Knox, 16 Wall. 551; and other cases decided by this court in construing the act of 1867. It was no attempt to deny to the appellants their day in court, but it was the exercise of the power of a court of equity, charged by the Act creating it with the administration of the estate, issuing its orders and process to preserve the CORPUS until the matters in controversy could be determined in a regularly constituted suit. But appellants argue that this is a SUBTERFUGE, to get around the clear provisions of section 23 (b) of the bankrupt Act. We do not so understand it. It is not a question of jurisdiction. It is a question of the power of a court, charged by the Act bringing that court into being and creating it for the express purpose of dealing with the estates of insolvents, to hold the matter in STATU QUO until the rights of all parties can be determ-

ined. That was all that was attempted in the case at bar and all that was actually done in the bankruptcy proceedings.

In every involuntary bankruptcy proceeding, some considerable time must necessarily elapse between the institution of the proceedings by the filing of the petition and even to the appointment of the trustee, and a large additional amount of time would elapse until the conflicting claims could be determined in regard to the property.

By reference to the Act we find that section 18 provides that the subpoena must be returned within 15 days and the Rule prescribed by this court provides that it must be executed at least 5 days prior to the return day. Section 18 (b) allows a creditor or the bankrupt ten days longer within which to appear and answer. After the adjudication, by section 7, sub-section 8, the bankrupt has ten days within which to file his schedules. The creditors are entitled to 10 days notice by section 58 of the Act of the first meeting of creditors in order to elect the trustee. So at the very earliest possible moment 45 days, or a month and a half must elapse prior to the election of the trustee. During all this time, what is to become of the property belonging to the estate? Allow it to remain in the hands of the insolvent and pretended purchaser, accountable to no one for its preservation, or shall the bankrupt court, sitting as a court of equity and by virtue of the express provisions of Section 2 Sub-Sections 3 and 5 of the Bankrupt Act, issue its orders and decrees and preserve the property, as was done in the case at bar, until the title to the same can be determined in the usual way by a regularly constituted suit? To state the question is to give the answer. In the case at bar, if the court had not taken possession of the property and

held it by its restraining order, injunction and receiver, in the bankruptcy proceedings, there would have been no estate to administer upon the election of the trustee. The trustee could have brought his suit, sued the pro verbial beggar, made the usual recovery and he would have had his costs for his trouble.

To exercise this power, is not to settle the title to property in a summary manner but is the exercise of the powers of a court of equity and the express provisions of the Act, to preserve the subject matter of the controversy IN STATU QUO until the title can be determined. We do not think that the power of the court to appoint the receiver and take possession of the property in the bankruptcy proceedings is an open one in the case at bar. The order was not appealed from, stands today as a valid order of the bankrupt court in the bankruptcy proceedings, unappealed from by any one.

This point would not have been noticed at all except from the ingenous argument of the appellants in their attempt to leave the impression upon this court that the receivership mentioned in the second question was the receivership in the equity suit of Cox, trustee, v Wall & Huske. The two receiverships, were separate and distinct, appointed by the court for different purposes; the one to hold the property IN STATU QUO, the other to reduce the property to money and hold the proceeds thereof to await the determination of the suit in equity.

The alleged fraudulent transfer to the appellants, being the Act of bankruptcy upon which the adjudication was made and the property being in the possession of the court as aforesaid, can Walter O. Cox, as trustee, file his ancillary bill in the bankrupt court, and have the title to the same determined in one litigation?

Williams v Benedict 49 U. S. 8 How. III.

Hagan v Lucas, 35 U. S. 10 Pet. 400.
Buck v Colbath, 70 U. S. 3 Wall. 334.
Heidritter v Elizebeth Oil Cloth Co., 112 U. S. 294.
Schenkle v Reiman, 86 N. Y. 270.
Union Trust Co. v Rockford, R. I. & St. L. R. Co., 6 Biss. 197.
Sedgewick v Mench, 6 Blatchf. 156.
Young v Montgomery & E. R. Co., 2 Woods 606.
Covell v Hyman, 111 U. S. 183.
Fox v Hempfield R. Co., 2 Abb. (U. S.) 157.
Rio Grande R Co., v Vinet, 132 U. S. 478.
Attleborough National Bk. v Northwestern Mfg. & Car Co., 26 Fed. Rep. 113.
Morrison v Menhaden Co., 37 Hun. 522.

The court which first takes cognizance of a controversy is entitled to retain jurisdiction to the end of the litigation and to take possession and control of the subject matter of the investigation to the exclusion of all interference by other courts of co-ordinate jurisdiction.

Although the bankrupt court has the property in its possession and subject to its orders, must the officer, who is an officer of the court, and giving bond to the United States under Section 50 of the bankrupt Act, go to the court of another sovereignty and there litigate the question of the title to this property with the fraudulent transferree? The district court in adjudicating bankruptcy declared that the transfer was fraudulent,—otherwise it would have refused to have made the adjudication, under section 3 (1) of the bankrupt Act,—now must the trustee go to the court of another sovereignty, have that court to decide whether, IN ITS OPINION, the district court of the United States decided correctly in adjudicating the transfer fraudulent and therefore Gilbert properly a bankrupt? Suppose this State Court should hold that this transfer was perfectly

valid, no fraud that it could see in the transaction and therefore Gilbert should not have been adjudged a bankrupt, what kind of a writ would this state court issue to the receiver of the district court having the property in its possession, to compel said receiver to turn over the property to it in obedience to its mandate?

In United States v Johnson County Supervisors, 73 U. S. 6 Wall. 166,—this court speaking through Mr. Justice CLIFFORD said:

> "State Courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain the process or proceedings in the National Courts. Circuit Courts and State Courts act separately and independent of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division was traced by landmarks and monuments visible to the eye."

See also United States v Keokuk, 73 U. S. 6 Wall. 514, 517.
Peck v Jenness, 48 U. S. 7 How. 612, 624.
French v Hay, 89 U. S. 22 Wall. 250.
Keen v Huidekoper, 103 U. S. 94.
Gaylord v Fort Wayne M. & C. R. Co., 6 Biss. 286, 291, 292.
Brooks v Delaplaine, 1 Md. Ch. 354.
Shields v Coleman, 157 U. S. 176.

In the conflicts which would arise between the district court and the state court to determine whether this transfer was fraudulent and Gilbert properly a bankrupt, what court would pass upon it? This court has held it would not do so in construing the Act of 1867 in the case of McKenna v Simpson 129 U. S. 506:—

"The decision of the State Court as to what should be deemed a fraudulent conveyance does not present any Federal question, nor does the application by the court of the evidence in reaching that decision raise one."

Is not the whole difficulty solved by allowing the transferree to intervene in the bankruptcy proceedings, in order to settle the controversy, or if he should refuse to do so, permit the trustee to file his ancilliary bill, or bring his action at law, as the facts of the case require, in the district court as the court of bankruptcy—the court having possession of the RES?

Rouss v Letcher 156 U. S. 47, 50.
Morgan L. & T. R. & S. S. Co. v Texas etc. Co. 137 U. S. 171 201.
M. & M. R. Co. v Soutter 69 U. S. 2 Wall. 609.

Any proceeding by the trustee to settle a controversy in regard to property lawfully in possession of the court, to be administered by the court, in the strictest sense of pleading, would be ancilliary. The proceeding in the case at bar, is involuntary—the original suit is the suit of creditors v Gilbert. Everything depends upon that proceeding. The right of the appellee to maintain this suit in any court, depends entirely upon his right as trustee appointed in the main proceeding of creditors v Gilbert. As a general rule, any proceeding to recover assets of which the court is charged with the administration, is ancillary, whether that court be the State Court or the Federal Court.

Stewart v Dunham 115 U. S. 61, 64.
Richmond v Ireland 121 U. S. 27, 52.
Rouss v Letcher 156 U. S. 47, 49.
Porter v Sabin 149 U. S. 479.
White v Ewing 159 U. S. 36, 37.

Mr. Justice BROWN, delivering the opinion of this court, in the case of White v Ewing, supra, in considering the right of a Receiver of the Circuit Court to bring suit in said Circuit Court to collect the assets of an insolvent corporation against defendants, residents of the same State and where the amount in any one case was less than the jurisdictional amount required, says:

> "In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of which it is charged; and if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction. In this particular the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which, to collect the assets of the bankrupt's estate we do not understand to have ever been doubted."

From the above quotation, there can be no doubt but that any proceeding on behalf of the trustee in bankruptcy, to recover property to be administered by the bankrupt court, is ancillary to the main suit of creditors to obtain the adjudication. This is especially so where the alleged fraudulent transfer is the act of bankruptcy and the court by means of its statuatory as well as inherent equity power takes possession of the property, without exception on the part of the alleged fraudulent transferree. The only question which remains to be considered is whether the provisions in Sect. 23 b of the bankrupt act operates to oust the court of the jurisdiction.

In considering the first question, we argued that this Sect. 23 b conferred upon the defendant a personal privilege and that he could waive that privilege in any manner analogous to the waiver of exemption to being sued out of his district. That the consent of the parties could not confer jurisdiction upon a court, but jurisdiction was given to the courts by the lawmaking power. We further argued, that this Section 23 b assumed the court had jurisdiction and that this jurisdiction was expressly granted to the District Court in Sect. 2 of the Act. This must be true because Sect. 23 b does not profess to give jurisdiction to any court. It assumes the district court has jurisdiction in the premises but cannot exercise jurisdiction over the person except in those cases where the defendant waived the objection. Consent cannot give jurisdiction to any court.

> "If the case were one of a want of jurisdiction in the court, it would not, according to well established principles, be competent for the parties by any act of theirs to give it."

Toland v Sprague 9 U. S. 12 Pet. 298, 330.

And we further argued that the objection to the jurisdiction of the court to proceed in the case without the consent of the defendants should be brought to the attention of the court by a plea in abatement, not by demurrer, because it did not appear upon the face of the record that the court was without jurisdiction. That the demurrer would only lie where the record showed the court to be without jurisdiction. If the court was without jurisdiction over the subject matter of the suit, objection could be taken at any time, or the court MERO MOTU would dismiss the suit as soon as the want of jurisdiction appeared, or, the parties could raise the objection by any form of pleading they elected to use.

"It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing appears to the contrary; hence has arisen the rule that the party claim an exemption from its process must set out the reasons by a special plea in abatement and show that some inferior court of law or equity has the exclusive cognizance of the case, otherwise the superior court must proceed in virtue of its general jurisdiction. This rule prevailed both at law and in equity. A motion to dismiss, therefore, cannot be entertained as it does not and cannot disclose a case of exception, and if a plea in abatement is put in, it must not only make out the exception, BUT POINT TO THE PARTICULAR COURT TO WHICH THE CASE BELONGS. A plaintiff in law or in equity is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court to which he has driven the plaintiff by his plea. An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue."

Rhode Island v Massachusetts 12 Pet. 657, 719.

A comparison of the statutes of 1887 as amended in 1888, supra, will show that section 23 (b) is not near so strong or sweeping in language or purpose as the above Statutes, yet it was held by this court in the case of White v Ewing, supra, opinion delivered by Mr-Justice BROWN:—

"The question certified does not, as we understand it, demand the opinion of this court as to whether a single bill against all of these defendants would lie for the amounts severally due by them (upon which point we do not feel called upon to express an opinion) ; but whether so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2000.00, the court had jurisdiction to render a judgment against them.

"This question must be answered in the affirmative. As was observed by this court in Porter v Sabin, 149 U. S. 479 when a court exercising jurisdiction, in equity appoints a receiver to hold the property of a corporation, that court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court holds and administers the estate through the receiver, as its officer for tbe benefit of those whom the court shall ultimately adjudge to be entitled to it.

"The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Co. by the filing of the original creditors bill by Bosworth a citizen of Massachusetts, and by the apppointment of a receiver; and any suit by or against such receiver, in the course of winding up of such corporation, whether for the collection of the assets or for the defense of its property rights, must be regarded as ancilliary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy. Freeman v How, 65 U. S. 24 How. 450, 460; Krippendorf v Hyde, 110 U. S. 276; Dewey v West Fairmont Gas Co., 123 U.

S. 329; Re Tyler, 149 U. S. 164, 181; Root v Woolworth, 150 U. S. 401, 413; Rouss v Letcher, 156 U. S. 47."

The cases cited above, hold, that where the court is charged with the administration of an estate in a creditors bill and through either its equity powers or by statuatory provisions, appoints a Receiver to hold the property with which it is charged, and begins the administration of the estate by means of such receiver, notwithstanding the plain and clear provisions of the Acts of Congress of 1887 as amended by the Act of 1888 the Circuit Court will entertain suits on behalf of such receiver, irrespective of the amount involved or the citizenship of the parties.

It would seem then, unless this principle is over-ruled by the recent case of Bardes v Bank, that notwithstanding the provisions of 23 (b) of the Bankrupt Act, that the district court, being the court empowered and authorized by the Act of Congress to administer estates of insolvents, and in the administration of such estates for the benefit of the parties whom it might ultimately decide entitled thereto, would have jurisdiction of an ancilliary suit to determine the title to property brought into that court by its officer or by the law, irrespective of the consent of the parties. There can be no distinction in principle or law between a trustee in bankruptcy and a receiver of the circuit court. Mr. Justice BROWN in White v Ewing says expressly there is none. The reports are full of cases in which the position of a receiver of the court in relation to property is compared with a trustee in bankruptcy. In the case of Grant v Buckner, 172 U. S. 238, this court uses as an illustration, where the receiver went into the State Court and contested a claim with an adverse claimant,

the case of a trustee; and held that the receiver as well as the trustee was bound by the judgment of the court. This case cites the cases of Mays v Fritton, 20 Wall. 414; Winchester v Heiskell, 119 U. S. 450. In practice there is none. The trustee is an officer of the court and is expressly made an officer by the terms of the Act (Section 33). He is required to give bond to the United States for the faithful performance of his duties and the wording of the bond, as prescribed by Supreme Court Form No. 15 is exactly the wording of a bond required from receivers in the Circuit Court.

It has been a recognized principle of law, that the court having jurisdiction of the RES on the filing of an original bill, will take jurisdiction of bills not original growing out of the first suit, without regard to the citizenship or other exemptions of the parties thereto.

Morgan's L. & T. R. & S. Co. v Texas Central R. Co. 137 U. S. 171, 202.
Clark v Matthewson, 37 U. S. 12 Pet. 164.
Jones v Andrews, 77 U. S. 10 Wall. 327, 333.
Pacific R. Co. v Missouri Pacific R. Co., 111 U. S. 505.
M. & M. R. Co. v Soutter, 69 U. S. 2 Wall. 609.
Krippendorf v Hyde 110 U. S. 276.
Dewey v West Fairmont G. C. Co. 123 U. S. 329.
Gumbel v Pipken, 124 U. S. 131.

And this is so, even if the bill, so called, is an original bill, about and concerning the RES, with parties, not parties to the original suit but interested in the subject matter of the suit.

Minn. Co. v St. Paul Co. 2 Wall. 609, 633.

Whether we consider these cases overruled by the case of Bardes v Bank, as is intimated by Judge LOWELL, In re Ward, supra, there is a clear distinction

between our case and that case. In the case at bar, the Receiver of the court was in possession of the property in controversy—and in our complex system of federal and State jurisdiction, that court whether State or Federal which first acquires jurisdiction of any subject of litigation must retain it to do full and complete justice between the parties; and not only to the parties to the record, but between them and any third person, not a party to the record, as to the subject matters of the litigation of which it has acquired jurisdiction. If, in the exercise of its jurisdiction, a federal court, be it, the district court, the bankrupt court, the circuit court, or the State court, by its receiver, its marshal or by injunctive process, comes to have the custody of property, either real or personal, a third person, not a party to the record or proceedings but claiming any right to or interest in such property, must come into such court and there litigate his rights.

No State court can entertain any suit with regard to property so held; and for that reason the federal court will sustain a suit in equity either to protect the rights of the third person or enforce the rights of its officers without regard to the citizenship and without regard to personal privileges of the parties because such a suit is not original but ancilliary and supplemental to the original suit out of which the question arises.

Freeman v Howe 65 U. S. 24 How. 460.
M & M R Co. v Soutter 69 U. S. 2 Wall. 609.

This principle is given the broadest scope in the case of Porter v Sabin, 149 U. S. 478, wherein certain stockholders of an insolvent corporation, which had been placed in the custody of a Receiver by a State Court, brought suit in the Circuit Court of the United States, against officers of the corporation who had fraudulently misappropriated its property.

Mr. Justice GRAY delivering the opinion of this court says:—

"When a court exercising jurisdiction in Equity appoints a receiver of all of the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court, and the court itself holds and administers the estate through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." (Citing Wiswall v Sampson, 55 U. S. How. 52, 65; Peale v Phipps, 55 U. S. 14 How. 368, 374; Booth v Clark 58 U. S. 17 How. 322, 334; Union Bank of Chicago v Kansas City Bank, 136 U. S. 223; Thompson v Phoenix Ins. Co. 136 U. S. 287, 297. (This paragraph is cited and approved in the case of White v Ewing, 150 U. S. 36, supra.)

"It is for that court in its discretion, to decide whether it will determine for itself ALL CLAIMS OF OR AGAINST THE RECEIVER, or will allow them to be litigated elsewhere. IT MAY DIRECT CLAIMS IN FAVOR OF A CORPORATION TO BE SUED ON BY THE RECEIVER IN OTHER TRIBUNALS, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of: and no suit, unless expressly authorized by statute, can be brought against the Receiver without the permission of the court which appoints him. Barton v Barbour, 104

U. S. 126; Texas & P. R. R. Co. v Cox, 145 U. S. 593, 601.

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the Receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of a corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remain in its custody to be administered and dis ributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of one government can by collateral suits assume to deal with RIGHTS OF PROPERTY OR OF ACTIONS, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. Wiswall v Sampson, 55 U.S. 14 How. 52; Peale v Fitts, 55 U. S. 14 How. 368; Barton v Barbour, 104 U. S. 126; Williams v Benedict 49 U. S. 8 How. 107: Pulliam v Osborne, 58 U. S. 17 How. 471, 475; Peoples Bank of Belleville v Winslow, 102 U. S. 256; Heidritter v Elizabeth Oil Cloth Co. 112 U. S. 294."

Such being the law, what sanctity has the Circuit Court which does not extend equally to the District Court?

What are the privileges more sacred to the alleged fraudulent transferree Wall & Huske, in the case at bar

than those belonging to the appellants John H. White and others in the case of White v Ewing, SUPRA? The Act of Congress provides that the Circuit Court of the United States SHALL NOT ENTERTAIN A SUIT where the amount involved does not exceed $2,000.00 and the same act of Congress provides THAT LITIGANTS SHALL NOT BRING A SUIT IN THE CIRCUIT COURT OF THE UNITED STATES, except in the cases therein mentioned, UNLESS THERE IS A DIVERSITY OF CITIZENSHIP AND THEN ONLY IN THE DISTRICT IN WHICH THE DEFENDANT RESIDES, yet in the long line of decisions in this court, beginning almost a century ago,—this court in construing the practice has uniformly held that these provisions shall not apply when the court is in possession of the RES and when the suit is not an original suit but is ancillary, dependent and supplemental, to the main suit.

What is the distinction between the case at bar,—the question certified, and White v Ewing SUPRA? Both are in the nature of creditors' bills. Both are dealing with an estate of an insolvent, charged by the law to distribute the assets belonging to said estate amongst the parties whom the court shall ultimately decide they rightfully belong. Both courts have seized the property and has same in its possession. The one court is represented by a receiver; the other by a trustee. Both officers of the respective courts appointing them.

Is there any difference between the positions of the defendants in the two cases? The one owes money to the insolvent corporation. In the case at bar the appellants by a conspiracy with the insolvent debtor have aided him to defraud his creditors and the transfer so made to them was the act of bankruptcy upon which the adjudication was made. The defendants in the one case were residents of the same district

with the receiver and owed amounts less than the jurisdictional amount of the circuit court; in the case at bar the appellants are residents of the same district with the trustee and the amount involved is sufficient to confer jurisdiction, if the amount alone was necessary; the title to the property by the express terms of the Act Sect. 70 thereof vests in the trustee upon his qualification, unless we assume as proven, what this suit is brought to test.

Under the Act of 1867, In Re Vogel, 7 Blatchf. 19, decision rendered by District Judge BLATCHFORD, whose opinion was sustained by Mr. Justice NELSON, of this court, while on the circuit.

> "It is manifest by these provisions that when a voluntary petitioner files his petition in due form, he becomes, EO INSTANTI, a bankrupt so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the bankrupt court, no other court and no person acting under any process from any other court can, without permission of the bankrupt court, interfere with it; and to so interfere, is a contempt of the bankruptcy court."

The court in the case at bar, as certified by the Circuit Court of Appeals, and as a matter of fact, had the property in the possession of its Receiver and the property is in the possession of said receiver to this time. Not only did it issue its restraining order, and its injunction, which we submit places the property in the possession of the court but it had the property in the

possession of its receiver. The appellants admit in what they call their "Reply to this Brief," that the court took possession of the property by injunctive process which under the decision In Re Vogel, is sufficient, and all that is required to place the property in custodia legis. But the court went further than that and appointed a receiver, who now holds the property and this second question presents a question of the right of the court, having possession of the property, to proceed with its administration, irrespecive of any personal exemptions or personal privileges of the defendant.

In the case of White v Schloerb, 178 U. S. 542, where the Referee had the keys to the store, this court decided that the bankrupt court had jurisdiction in a summary manner to restrain the sheriff in a replevin suit and compel said sheriff to surrender the goods. It is asked in this case whether the court having the possession of the property by its receiver can do the same thing in a plenary suit. If the bankrupt court in White v Schloerb, supra, has jurisdiction in a summary proceeding to try title to property wrongfully taken from the court, it should most certainly have the same jurisdiction when it has possession of the property, actually in custodia legis, to pass upon the conflicting claims of the trustee and the third party irrespective of any personal privileges or exemptions of the third party.

The question certified in the case is not the question decided by this court in Bardes v Bank. The questions present to this court the right of the bankrupt court, having possession of the property and, we think the question of jurisdiction of the district court, sitting as a court of bankruptcy, should be determined by analogy to other courts. The Court which has possession of the property in controversy, will retain jurisdiction for all purposes and make a final adjudication among all

parties interested therein; that it has jurisdiction and should exercise it in one litigation, to prevent multiplicity of suits, to prevent conflicts with the courts of another sovereignty, to protect and preserve the property and to finally distribute same amongst those whom the court shall decide ultimately entitled thereto. This has been the practice both in the Federal and State courts.

Re Chetwood, 165 U. S. 443; White v Schloerb 178 U. S. 542; White v Ewing 159 U. S. 36; Porter v Sabin 149 U. S. 473; Chapman v Brewer 114 U. S. 158; Heidritter v Elizabeth Oil Cloth Co. 112 U. S. 294; Krippendorf v Hyde 110 U. S. 276; Hagan v Lucas 10 Pet. 400; Peck v Jenness 7 How. 612; Shawhan v Wherritt 7 How. 627; Wilwall vs Sampson 14 How. 52; Buck v Colbath 3 Wall. 334; Slocum v Mayberry 2 Wheat. 2; Freeman v Howe 24 How. 450; Taylor v Carryl 20 How. 583; Peale v Phipps 14 How 369; Williams v Benedict 8 How. 107.

Respectfully submitted,

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Attorneys for Appellee.

(Swink & Swink, Jones & Patterson, A. H. Eller and D. H. Blair with them on brief.)

Winston, N. C., March 10, 1901.

APPENDIX.

Opinion of Ewart J. as reported in 99 Fed. Rep. 546.

This is a bill in equity filed by the complainant as trustee of the bankrupt for the purpose of setting aside a sale made by the bankrupt Gilbert to the respondents of a certain stock of hardware, the said sale having been made, as complainant alleges, in fraud of the bankruptcy act and in fraud of the creditors of the said estate. The facts are as follows:

Gilbert was a retail hardware dealer in the city of Winston, N. C., carry a stock of $16,000 to $18,000. Becoming embarrassed in June, 1899, he secured an extension from his creditors, executing notes in large amounts maturing December, 1899, and January, 1900. Immediately after securing this extension, he bought largely of hardware dealers, increasing his stock to an abnormal extent, at the same time selling stock in hand at cut prices, at and below cost.

In September, 1899, Gilbert repeatedly attempted to dispose of his stock, both at Martinsville, Va., and Winston, N. C., offering the same at figures considerable below alleged cost.

On or about the 10th day of October, 1899, he sold his Winston stock to respondents, and immediately thereafter left the State. Proceedings in involuntary bankruptcy were at once instituted by his creditors, and he was duly adjudged a bankrupt, and Cox, the complainant, elected trustee of his estate.

The respondents demur to the bill filed in this cause, raising the question of the jurisdiction of the District Court to entertain this cause. It is claimed that as the bankrupt, the trustee and the respondents are all citizens of this State and residents of this district, that by section 23 b of the act cognizance of such a controversy can only be taken by the State Courts.

It is so regretted that the decisions of the Courts upon this question have not been uniform; on the contrary, there are many conflicting opinions. In support of the proposition that the district court has jurisdiction VIDE:

In Re Gutwillig, Fed. Rep. 99 page 337, 34 C. C. A. 577; Davis vs Bohle Fed. Rep. 92 page 325, 34 C. C. A. 372; Carter vs Hobbs Fed. Rep. 92 page 59; In Re Seivers 91 Fed. Rep. 366; In Re Fixen & Co. 96 Fed. Rep. 753; In Re Richards 94 Fed. Rep. 636; In Re Smith 92 Fed. Rep 135; In Re Newberry 97 Fed. Rep. 24; In Re Byrne 97 Fed. Rep. 763; Robinson vs White 97 Fed. Rep. 34 contra; Mitchell vs McClure 91 Fed. Rep. 621; Burnette vs Mercantile Co. 91 Fed. Rep. 365; In Re Kelly 91 Fed. Rep. 504; In Re Rockwood 91 Fed. Rep. 363; In Re Buntrock 92 Fed. Rep. 836; Heath vs Shaffer 92 Fed. Rep. 646; In Re Abraham 93 Fed. Rep. 774.

A careful examination of the cases decided satisfies me that the section referred to, to wit: 23 b providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted" is a limitation upon the jurisdiction of the circuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and that a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have

been conveyed or transferred in fraud of creditors, notwithstanding that the trustee and the bankrupt and the defendants are all citizens of the State.

In reaching this conclusion I do not wish to be understood as casting any doubt upon the jurisdiction of the courts of the State to entertain jurisdiction and try suits for any cause of action whatever, brought by the trustee of a bankrupt against parties who fraudulently or otherwise were in possession of the bankrupts estate, or were indebted to the bankrupt.

I am clearly of the opinion that the courts of this State are invested with complete and plenary jurisdiction over fraudulent transfers and conveyances concurrent with this court, and that which ever of the two courts first took cognizance of the case had the right to finally and conclusively dispose of same.

In the case at bar, Cox, trustee for Gilbert, bankrupt chose to institute his bill in equity in this forum, and this court has therefore, acquired jurisdiction.

Vide Ex-Parte Christy, 44 U. S, R. 292; Federal Cases No. 616 Fed. Cases No. 8, 885; Burbank v Bigelow, 92 U. S. R. 179; Woolridge v McKenna, 8 Fed. Rep. 650; Olney v Tanner, 10 Fed. Rep. 101; In Re Anderson, 23 Fed. Rep. 482; Federal Cases No. 709, Fed. Cases No. 8,973; Federal Cases No. 5956; Loveland on Bankruptcy, page 490; Black on Bankruptcy, page 123; Lea Bros. v West, 1st Amer. B. Reg. 264; Affirmed in U. S. Supreme Court, 2 A. B. R; In Eldridge Furniture Co. 1 A. B. R. 112; In Re Bruss-Ritter Co. 1 A. B. R. 58; Carpenter Bros. v O'Connor, 1 A. B. R. 381-384; In Re McKee, 1 A. B. R. 311.

As has been well said by Judge Severns, In re Newberry, 97 Fed. Red. 24: "An anomalous state of things would be presented if the bankruptcy court, which is charged with duty of prompt action in collect-

ing and distributing the estate of the bankrupt should be compelled to await, and be balked by the pendency of proceedings in another court having jurisdiction entirely foreign to its own, and in no manner subject to it."

It is further insisted by respondents that the claimant, as trustee, if he had any right to the stock of goods described, has a plain, clear and adequate remedy at law, and cannot invoke the equitable jurisdiction of this court to enforce his right.

Section 723 Rev. Stat. U. S. provides: "That suits in equity shall not be sustained in either courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

The construction placed on this statute by the Supreme Court of the U. S. is as follows:

"It is not enough that there is a remedy at law, it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy is in equity."

Boyce v Grundy, 3 Pet. 215; Watts v Southerland, 5 Wall. 74.

But the foregoing statute, which is merely declaratory as a rule in common law, is no more binding than the following well established rules governing the proceedings in equity. Equity has always had jurisdiction of subjects like fraud, misrepresentation, concealment and specific performance, and cancellation of instruments which equity has jurisdiction per se and the rule of inadequate legal remedy does not apply.

Amer. & Eng. Enc'y of Law, Vol 2,—201.

Equity always has jurisdiction of fraud, misrepresentation and concealment, and it does not depend upon discovery.

Jones v Bowles, 9 Wall. 364.

Courts of Equity will aid a creditor by removing a fraudulent encumbrance, or a conveyance of his debtor's property.

Hogan v Walker, 55 U. S. R. 29.

In Clement v Nichols, 6 Wall. 299, the same being a creditors bill in the district court to set aside a fraudulent transfer of a stock of goods, it was held, "that equity is the appropriate remedy, being more flexible and capable of administering justice than can be done under the rules of law."

Vide also Rudgens v Knutt, 20 How. 45; Venable v Bank, 2 Pet. 107.

In former bankruptcy acts equitable jurisdiction of the court invoked in the following cases:

Stickey, assignee v Bank 108 U. S. R. 132; Grant, assignee v Bank, 7 Otto. pp. 80; Rogers, assignee v Palmer, 102 U. S. R. 363; Affin v Rasin, assignee, 102 U. S. R. 620; Barlow v Priest. assignes, 103 U. S. R. 293; Duth et al v Wright, assignee, 94 U. S. R. 553; Phipps v Sedgewick, 95 U. S. R. 3; Noblett v McFarland, 92 U. S. R. 101; Goodenow v Milliken, Fed. Cases 5,535; Federal Cases, 6,072: People v Breman, 12 N. B. R. 567.

The jurisdiction is not confined to fraudulent conveyances of real estate, but it extends as well to fraudulent sales of personal property.

Enc'y Pleading & Prac. Vol. 5, pp. 405; Carter v Parker, 10 Me. Appls. pp. 363.

In the matter of alienation of personal property by any means which is in fraud of creditors, courts of equity and courts of law have concurrent jurisdiction.

Smiths Equitable Rem. of Creditors, page 92; Atkins v Dick, 14 Pet. 114.

In a bill filed by a trustee like this the bankrupt is

not a necessary party. The bankrupt is not a necessary party to a suit to avoid a fraudulent transfer.

Buffin v Harvey, 95 U. S. 99; Benton v Allen, 22 Fed. Rep. 448; Harding v Crosely, Fed. Cas. 6,050; Smith's Equit Rem. of Creditors, page 82.

The complainant asks that a receiver be appointed. Mr. Smith in his most excellent work on Smith's Equitable Remedies of Creditors, page 315 says: "It is common practice in equitable proceedings, either in creditors bills or bills in the nature of creditors' bills and supplemental proceedings, to appoint a receiver when the property is of such a nature as to render it necessary, or to facilitate the action of the court. The appointment is peculiarly appropriate if the transfer consists of personal property, where the possession is an important factor of ownership, and where concealment or removal is so easily accomplished."

The Supreme Court of North Carolina in Ellett v Newman, 92 N. C. 523, in a case involving personal property very similar to the case at bar, uses the following language: "The authority of the court to preserve property the subject of litigation, pending the action, until final judgment, and then apply it as justice may require, is too manifest to admit of question and such authority should be exercised when it appears that there is reasonable grounds to believe that the plaintiff may cover, and the interference of the court is necessary to protect the property in question pending the controversy."

Vide Parker v Grammar, Phil. Eq. pages 28, 32; Graycroff v Morehead, 67 N. C. 422; Morris v Willard, 84 N. C. 293; Levenson v Elson, 88 N. C. 182; Twitty v Logan, 80 N. C. 89; Cone v Combs, 18 Fed. Rep. 576; Sheppard v Pepper, 133 U. S. 626.

In the case at bar it appears that this is a stock of

merchandise subject to deterioration and fluctuation in prices. That no inventory of the property has been taken, and until this is done no correct estimate and value can be placed thereon. That the respondents owe eight thousand dollars to the Wachovia National Bank of Winston, and that their property is listed at little more than $9,000, nearly all of wnich is personal property. In view of these facts, in the judgment of the court, it is proper that a receiver should be appointed until the equities of all parties interested should be determined by a final decree.

Upon the rendering of the foregoing opinion, the appellant Wall & Huske, filed a petition for review in the circuit court of appeals for the Fourth Circuit and the cause was there heard in February, 1900, before GOFF and SIMONTON, Circuit Judges and WADDILL, District Judge and the opinion of the court was delivered by His Honor WADDILL, District Judge on May 1st, 1900, which for the convenience of the court is here printed in full and will be found duly reported in the Federal Reporter, Vol. 101, at page 403:

"This case is now before the court on an application to "superintend and revise in matter of law" a certain decree of the United States District Court for the Western District of North Carolina, and the real question presented is whether said court has jurisdiction in equity to entertain a bill to set aside and annul a bill of sale for a stock of goods made by the bankrupt, W. H. Gilbert to the petitioners here, three days before the petition of involuntary bankruptcy was filed against him by his creditors, and on account of which bill of sale he was adjudged a bankrupt."

The trustee for the bankrupt attacked said transfer

because fraudulent, and made to hinder, delay and defraud the bankrupt's creditors, and averred that the petitioners here entered into collusion with the bankrupt to defraud his creditors, and insisted that the goods were still the property of the bankrupt, and the title in him as trustee. Said petitioners, on the other hand, claim to be purchasers in good faith, and for a present fair consideration, and raise especially the question of jurisdiction aforesaid.

The question of the jurisdiction of the United States District Court over controversies between third parties, or adverse claimants to the bankrupt, and the bankrupt's trustee, is one that gave rise to much controversy under the former bankrupt laws, and the present act has afforded fresh opportunity for a revival and renewal of many of the objections urged against previous legislation on the subject of the Federal court's jurisdiction. Indeed, under the present act, the claim of limitation on the jurisdiction of the United States District Court goes to the extent of excluding that tribunal from all jurisdiction in cases of the class now under consideration; the contention being in effect, that the jurisdiction conferred upon that court under the existing act is administrative merely in its character, and is limited to entertaining petitions of bankrupts, making adjudications in such cases. distributing the estates brought in, and granting discharges; and that as to all matters affecting the bankrupt's estate, the bringing in and collection of assets, the determination of the rights of the parties of the character involved in this cause, that resource can alone be had to the state courts, unless it happens that by the amount involved, and the citizenship of the parties jurisdiction would be in the United States Circuit Court. And the contention as to where the bankrupt's trustee can sue goes even further, name-

ly, that he is confined entirely to the state court, unless suit be allowed in the United States Circuit Court with the defendant's consent.

The far reaching effect of these conflicting claims will readily be appreciated; one makes the state courts practically the medium through which the law is to be administered, the other the federal courts. If the district courts have only the jurisdiction conceded to them, then they become so far as the bankrupt's estate is concerned unimportant tribunals, their chief office as to the bankrupt's estate being to distribute ratably among creditors such estate as the bankrupt sees proper to bring in, or such as other courts may from time to time, and indefinitely, decide should be distributed.

In the consideration of so important a question, in the administration of a national bankrupt law, it is fortunate that we are aided by the interpretation given by the highest courts in the land to previous acts, having under review the same positions taken here, and while, of course, these decisions are not controlling in the interpretation of the present act, they shed much light on the question, and to them, as well as to the fact that the subject under consideration is that of a national bankruptcy act, suppose to be uniform in its character great consideration should be given.

In the case of Lathrop v Drake, 91 U. S. 516, Mr. Justice BRADLEY, in discussing the jurisdiction of the District Court under the act of 1867 said:

"Of this there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or the refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in

reference to alleged property of the bankrupt or to claims alleged to be due from or to him. The language conferring this jurisdiction in their respective districts, in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the general classes before mentioned."

If the two distinct classes of jurisdiction thus mentioned by Mr. Justice BRADLEY are kept in view, it will aid materially in the interpretation of the present act for precisely the same classes of jurisdiction in terms are enumerated in the present act—indeed the act of 1898 goes further than either the act of 1841 or 1867, in describing the second class, and specifically provides that the District Courts shall be invested with such jurisdiction "at law and in Equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."

Just why jurisdiction "at law and in equity" should have been bestowed, if only the purpose was to create the mere administrative tribunal claimed, cannot well be conceived. The act in this regard is more comprehensive than the previous acts, those of 1841 and 1867 not containing the words "at law and in equity" in terms.

The grant of jurisdiction to the District Court under the act of 1898 is found in section 2 of the act, and is in these words:

"Are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established or as they may hereafter be changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their

respective terms, as they are now or may be hereafter held."

And then follows the jurisdiction at law and in equity mentioned and defined specifically in the sub-divisions, to wit:

To (1) "Adjudge persons bankrupt who have had their principal place of business, etc.

(2) "Allow and disallow claims," etc.

(3) Appoint receivers or marshals, upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition, and until it is dismissed or the trustees qualified."

(5) "Authorize the business of bankrupts to be conducted for limited periods by receivers," etc.

(6) "Bring in and substitute any additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of the matter in controversy."

(7) "Cause estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

(15) "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

Then continuing the specific enumerations (nineteen in all) those specially quoted above relating particularly to the jurisdiction as a court of law and equity and the others to the jurisdiction as a court of bankruptcy, over bankruptcy proceedings, concludes:

"Nothing in this section shall be construed to deprive

a court of bankrup'cy of any power it would possess were certain specific powers not herein enumerated."

This proviso and conclusion of the section shows plainly that it was not the purpose of Congress in enumerating the nineteen specific grounds of jurisdiction to limit or take away the jurisdiction conferred by the general grant of power. The language "such jurisdiction at law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during their respective terms as they are now or may hereafter be held," would clearly confer upon United States District Courts jurisdiction to hear and determine cases of the character now under consideration. To clothe the court with power to entertain a petition in bankruptcy, and discharge and relieve the bankrupt from the payment of his debts, and not to confer upon it the power to make the power thus receiving an acquittance and release, and those fraudulently colluding with him, bring in and give up to the creditors interested the bankrupt's property which of right belongs to them, would be a strange anomaly, and unless there is something in the jurisdiction of the law of bankruptcy, and the jurisdiction conferred on courts of bankruptcy, so peculiarly engaged in the administration of insolvent estates, and the detection and prevention of fraud, and singularly combining in their legal nature and operations the elements and powers of courts of admiralty and courts of equity, it ought not to be accepted and adopted. To say that the United States District Court, sitting as a court of bankruptcy, with all the analogous powers and jurisdiction of a court of equity, and with jurisdiction at law and in equity specially conferred upon it as ancillary and supplementary to its inherent power, in an involun-

tary bankruptcy proceeding, can only afford the creditors the relief of making certain that the debtor is a bankrupt, and has committed acts of bankruptcy, and where he has fraudulently transferred his estate, although it be the act of bankruptcy set up, as in this case, that as against the alleged fraudulent transferree no relief can be afforded, but the creditors must inaugurate in the State courts, wherever such transferree may reside, litigation to secure any substantial relief would be to impose upon them a burden that would be unreasonable in the extreme, and in many cases one that would be entirely ineffective; and besides, it would bring about a result manifestly not contemplated by those enacting the law, the predominating feature of all bankruptcy legislation being simplicity and expedition in the collection and administration of bankrupts' estates. Bankrupts wishing to defraud their creditors, and those colluding with them, would be a bungling set of conspirators who could not elude and evade a law so handicapped by the machinery necessary to put it in motion, and the result would be that the estate, pending the many stages of litigation through which creditors would have to pass, and, indeed in anticipation of the necessity of the various requirements, would be readily placed beyond their reach.

The claim of limitation upon the District Court's jurisdiction is based upon the concluding words, "except as herein otherwise provided," in sub-division 7, section 2. The subdivision reads:

(7) "Cause estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Those making this contention apparently overlook the concluding paragraph of section 2 of the act, which

provides that the particular specifications named shall not be construed to deprive the court of bankruptcy of any jurisdiction conferred by the general grant of power. The bankrupt act of 1841 was less comprehensive as to the District Court's jurisdiction than is the present act, for no specific power to collect debts was given, nor were the courts granted in terms common law and equity jurisdiction."

Section 6 of the act is as follows:

"The District Court in every district shall have jurisdiction in all matters and proceedings in a bankruptcy arising under this act. And the jurisdiction hereby conferred on the District Court shall extend to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the closing of the proceedings in bankruptcy."

The act, however, was held to confer jurisdiction upon the court, the same being declared to be incidental to the powers given. Mitchell v Manufacturing Co., Fed. Cas. No. 9,662, Ex parte Christy, 3 How. 312. Under the bankrupt act of 1867, the provisions as to the Court's jurisdiction was as follows:

"The Several District Courts of the United States are hereby constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. And the jurisdiction hereby conferred shall extend———————— to the collection of all the assets of bankrupt."

Under this clause the court held that the jurisdiction at law and in equity was granted, being necessarily implied from the powers expressly given. Lathrop v Drake, 91 U. S 516, supra; Goodall v Tuttle, Fed. Cas. No. 5,533; Sherman v Bingham, Fed. Cas. No. 12,762.

Those disputing the District Court's jurisdiction insist that the qualifying words "except as herein otherwise provided" of subdivision 7, section 2, refer to section 23, subdivisions "a" and "b" and that the effect of the qualification is to take from the Federal District Court jurisdiction in all cases of the character now under consideration; or where the rights of third persons in possession of and adverse claimants to the bankrupt or his trustee are concerned.

We need not specifically consider subdivision "a," section 23, as it does not immediately concern the question presented in this case. In passing, it may be said that abundant scope can be given that section, without in the slightest infringing on the general chart of jurisdiction laid out for the United States District Court, and in entire harmony with that court's jurisdiction.

1st. One of the purposes of said subdivision was to make clear that the full and sweeping jurisdiction given the District Court in bankruptcy matters, should not operate to take away from the Circuit Court its proper jurisdiction in cases arising out of the bankruptcy proceedings, where the amount and citizenship of the parties entitle them to go into a Federal Circuit Court.

2nd. Another to prescribe that the trustee of a bankrupt's estate should not, merely because of his being an officer of a Federal Court, have the right to go into the Circuit Court, regardless of the amount involved, or of the citizenship of the parties.

Subdivision 23 "b" is as follows:

"(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted; unless by consent of the proposed defendant."

The construction placed upon this clause has not been harmonious; indeed, quite a contrariety of views have been judicially expressed as to its true intent and meaning. Some insist that it refers not to the jurisdiction of the court at all, but to the venue of suits and required suits to be instituted in the district and subdivision in which they could have been brought if prosecuted by the bankrupt; others, that it is meant as limitation on the jurisdiction of the Circuit and not the District Court; others, that it confers jurisdiction to the State court, except with the consent of the defendant, and others, who earnestly insist that it places all jurisdictions in the State courts. Which of either of these conflicting constructions may be correct, we need not stop to determine, as in our view the clause in question clearly does not, assuming the exception in subdivision 7, Sec. 2, specially to refer to it, take away from the United States District Court jurisdiction to entertain suits of the character now under consideration, or causes affecting the bankrupt's estate, merely because the rights of third persons, or parties claiming or having an interest adverse to the bankrupt or his trustee, may be involved. Those making the claim are forced to deny the jurisdiction of the United States District Court altogether: their theory is inconsistent with concurrent jurisdiction in the two courts, and if they are right, the result inevitable follows that the State courts have exclusive jurisdiction of this class of suits, and as to suits by the bankrupt's trustee, it even denies him the right of admission to the United States Circuit, as well as the District Court, although by paragraph "e" section 70, he is specially authorized to avoid any transfer of the bankrupt's estate that a creditor of the bankrupt might have avoided, or to recover any property, or the value, so

transferred, from the person to whom it was transferred, and such creditor could have proceeded in the United States Circuit Court in a proper case for its jurisdiction.

The exception contained in subdivision 7, sect. 2 was manifestly not intended to have the effect claimed for it, and it cannot be given that interpretation without violating well understood canons of construction. That exceptions should be strictly construed is elementary, and if an interpretation of an act will give effect to its several provisions, as against one that will only partially accomplish this purpose, can be arrived at, it should always be adopted. An exception should not be construed as to wholly destroy the grant of which it forms a part. United States v Dickson, 15 Pet. 141, 165; Dallas Sav. Bank v U. S. 19 Wall. 227; Ryan v Carter, 93 U. S. 78.

The view presented that section 23b has reference to the VENUE, rather than to the jurisdiction of the court, has considerable force in it, as it should not be presumed that Congress meant to legislate upon the theory that the consent of the defendant could give jurisdiction to a court, and consent is entirely consistent with the idea of venue. It is allowable for a defendant to appear and submit to the jurisdiction of a court otherwise possessed of jurisdiction, and in which he could not be sued without his voluntary appearance. But his consent would avail nothing if the court was not clothed with jurisdiction of suits of the character involved; and full scope can be given to the section by its application to cases of the class that the bankrupt might have brought; i. e. to the collection of debts due the bankrupt. To require such suits to be brought at the debtor's home in the state court, is perhaps what Congress intended, unless with consent of the defendant suit should be instituted

in the United States District Court, a tribunal also having jurisdiction of the parties, and over the whole subject matter.

To allow this section to qualify the whole bankrupt act, and at the same time make it applicable as well to suits that the trustee brings, as the representative of the creditors, as to those of the character that the bankrupt himself could not have brought, would be to clearly violate the plain letter and manifest spirit of the act. Another view shows conclusively that it was not intended to take away from the bankrupt court jurisdiction of the class of cases now under consideration, namely, which involves dealings with the bankrupt's estate in contravention of the rights of his creditors, the bankrupt could not have brought such suits. This is a suit by the trustee in bankruptcy to set aside and annul an alleged fraudulent bill of sale, and transfer of property made by the bankrupt on the eve of his going into bankruptcy, and to have the property of the bankrupt surrendered to the trustee, cleared of such cloud on his title. The trustee is vested as of date of adjudication, by operation of law, with the title of the bankrupt, among other things, "to all property transferred by him in fraud, of his creditors, as well as to all property, which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold by judicial process against him." Bankruptcy Act. Section 70.

The word "transfer" includes the sale and every other mode of disposition of or parting with property, absolutely or conditionally, as by payment, pledge, mortgage, security or gift. Bankruptcy Act, Sec. 1, clause 55.

The title to the property alleged to have been fraudulently conveyed, by the express terms of the act, as of

date of adjudication, vests in the bankrupt's trustee, upon the assumption of the transfer being void, and the bankrupt court has, as authorized by the act, appointed a receiver to seize and take charge of the property involved, and now, in fact holds the same. Can it be seriously claimed that in such a case with an officer of the court before it with property thus vested in him, and the same seized by the court, and brought in for the benefit of creditors, that the court is powerless to afford relief either to its own officer or to the creditors of the bankrupt, because the rights of an alleged fraudulent transferree is involved, and that on that account the hands of the bankrupt court should be stayed until the question of the transferree's rights can be determined in a state court? This cannot be the law. The property is in custodia legis, and all persons having interest in it, or claiming title to it, have necessarily to come into court having it in charge. Any other course would be unheard of: it would be to except the United States District Court from the otherwise universal and fundamental rules, principles and practices of courts of justice in respect to property lawfully under their charge.

Another view of the act would seem to be equally conclusive of the question under consideration. The whole act should be taken into account, and not a single or isolated section.

"It is an established rule in the exposition of statutes, that the intention of the law giver is to be deduced from a view of the whole and every part of a statute, taken and compared together————————And the reason and intention of the law giver will control the strict letter of the law, when the latter would lead to a palpable injustice, contradiction and absurdity." I Kent. marginal page 462.

"The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes, relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to the making of it effectual or requisite to attain the end is implied. 1 Kent. marginal page 464.

When the fact is taken into account that the question presented is whether Congress meant in dealing with a subject confined by the Constitution to the Federal government, and effecting the people of the entire country, and especially charged to be uniform in character, meant to leave the important features of jurisdiction, under the enactment, to the conclusive control of the courts of forty-four different States, or to the Federal courts, where one general and harmonious rule of interpretation should be adopted and followed, there ought to be but little difficulty in reaching a corect conclusion. The State courts, as to many matters in which conclusive jurisdiction is not conferred on the Federal courts, have a concurrent jurisdiction with the courts of bankruptcy, but such jurisdiction is not conferred by act of Congress—it exists in those courts by reason of their general jurisdiction, and independent of any enactment of Congress. Indeed, Congress is without power to give jurisdiction to the State courts to administer the bankrupt law, so far as the collection of the estates of the bankrupt is concerned; and while such State courts in enforcing the rights and duties under the Federal law exercise the concurrent jurisdiction with Federal courts, it is entirely a discretionary jurisdiction on their part, and one they may wholly renounce or conditionally exercise whenever they wish to do so. Sherman v

Bingham, Fed. Cas. No. 12,762; Goodall v Tuttle, Fed. Cas. 5,533; Martin v Hunter's lessee, 1 Wheat. 304.330: 4 L. Ed. 97; Robertson v Baldwin, 165 U. S. 275,17 Sup. Ct. 326, 41 L. Ed, 715.

Every consideration accentuates the desirability if not the necessity, of the Federal courts having at least a concurrent jurisdiction in the administration of a national Bankruptcy act. It cannot be presumed that Congress was not fully alive to the importance of this question, particularly as it was one upon which so much stress was laid under the former acts. In discussing this question, in Ex-Parte Christy, 3 How. 292, 320, 321, supra, Mr. Justice STORY said:

"If we are told that resort may be had to the State courts for redress, one answer is, that in some of the States no adequate jurisdiction exists in the State courts. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the State courts of twenty-six States, which were independent of any control by the general government, and were under no obligation to carry the system into effect. The judicial power of the United States is, by the Constitution, competent for all such purposes, and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do. The truth is that in no way could the bankrupt system be put in operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof."

And in Lathrop v Drake, 91 U. S. 516, 518, supra, Mr. Justice BRADLEY said:

"The State courts may undoubtedly be resorted to in case of ordinary suits for the possession of property or

the collection of debts; and it is not to be presumed that embarrassments would be encountered in these courts in the way of a fair and prompt administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence of those of the States in which it is possible that embarrassment might arise."

The precise question here presented under the Act of 1898, as far as we have been able to ascertain, has never been passed upon by the Circuit Court of Appeals of any of the circuits, though on kindred questions, and in some instances, one almost conclusive of the present controversy, several of these courts have passed, namely; In the Second circuit in Re Gutwillig, 34 C. C. A. 377, 92 Fed. 337; In the Eighth circuit, in Davis v Bohle, 34 C. C. A. 37, 92 Fed. 325; in the sixth circuit, in Carriage Co. v Stengel, 37 C. C. A. 210, 95 Fed. 637; in the ninth circuit, in Re Francis-Valentine Co. 36 C. C. A. 499, 94 Fed. 793; in the fifth circuit, in Re Abraham, 35 C. C. A. 592, 93 Fed. 767; and in this circuit in Bear & Co. v Chase trustee, 99 Fed. 920.

The decisions in all of the circuits, with the exception of the Fifth, have been favorable to the views herein expressed, while those of that court tend rather to support the contrary view. The decisions of the District Courts have likewise been favorable to the views herein expressed. Only the cases in those courts beariug particularly on the point in issue here and in conformity herewith will be given. In re Seivers, 91 Fed. 366; Carter v Hobbs, 92 Fed. 39; In re Smith, 92 Fed. 135; Robinson v White, 97 Fed. 24; In re Newberry, 97 Fed. 24; Murray v Beal, 97 Fed. 567;

In re Woodbury, 98 Fed. 833; In re Hammond, 98 Fed. 845; Pepperdine v Headley et al, 98 Fed. 863.

The following text writers in their treatises upon the present act, will be found to support the jurisdiction of the District Court herein laid down. Loveland on Bankruptcy, pages 67-73, 409; Black on Bankruptcy, pages 123-4; Lowell on Bankruptcy, pages 411-12; Collier on Bankruptcy, pages 14-19; Smith's Equitable Rem. of Creditors, Secs. 407, 418.

The petitioners earnestly insist that if the United States District Court has jurisdiction to entertain a suit of the character under consideration, that the action should be by appropriate proceedings at law, and not by bill in equity.

That courts of equity are clothed with full power and authority to entertain suits involving questions of fraud in conveyance and transfer of property, and the annulling and cancellation of such transfers, is too well and firmly established in the jurisprudence of the country to admit of serious question at this late day.

It is not enough that there is a remedy at law, it must be plainly adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. (Boyce v Grundy, 3 Pet. 213).

In Clements v Moore, 6 Wall. 299, the same being a creditors bill in the District Court to set aside a fraudulent transfer of a stock of goods, the court said that Equity was the appropriate remedy, being more flexible and tolerant, and capable of administering justice to fit the particular case, than could be done under the rules of law.

"It is object that a court of equity has no jurisdiction of the case because the law affords a complete remedy

in damages, This objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment; and it does not depend on discovery." (Jones v Bowles, 9 Wall. 364, 369).

"Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

(Mr. Chief Justice FULLER, in Kilbourne v Sunderland, 130 U. S. 505, 515).

For the reasons giving the decision of the lower court is affirmed at the costs of the petitioners.